

***United States Court of Appeals
for the Second Circuit***



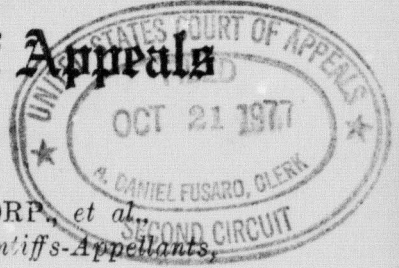
APPELLEE'S BRIEF

To be argued by
MARTIN KLEINBARD

77-7037

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P/S

United States Court of Appeals
For the Second Circuit



NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

and

COURTESY AUTO BROKERS, et ano.,
Plaintiffs,
against

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLEES
GENERAL MOTORS CORPORATION
and
GENERAL MOTORS ACCEPTANCE CORPORATION

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TABLE OF ABBREVIATIONS

The following abbreviations are used:

"A" followed by a number refers to a page in the joint appendix.

"DX" followed by a letter refers to a defendants' exhibit.

"E" followed by a number refers to a page in the exhibit volume.

"Pl. br." followed by a number refers to a page of plaintiffs' "revised" appeal brief, dated August 8, 1977.

"PX" followed by a number refers to a plaintiffs' exhibit.

"R" followed by a number refers to a document in the record on appeal.

"Tr" followed by a number refers to a page in the trial transcript as paginated by the reporter below. The trial transcript is contained in documents 917 through 922 of the record on appeal.

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Docket No. 77-7037

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On Appeal from the United States District Court
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BRIEF OF APPELLEES
GENERAL MOTORS CORPORATION
and
GENERAL MOTORS ACCEPTANCE CORPORATION

Eight of the plaintiffs¹ appeal from a judgment dismissing the complaint which was entered on a directed verdict granted at the conclusion of plaintiffs' case. Judge Griesa's opinion is reported at 1976-2 TRADE CAS. ¶61,211 and appears at pages A6330 through A6395 of the appendix. An annotated copy is being submitted herewith as a supplementary appendix. The opinion is cited in this brief to the joint appendix and as "TRADE CAS." followed by the relevant pages.

1. Plaintiffs Courtesy Auto Brokers and Robert B. Heim consented to judgment (A6398) and do not appeal (A6401).

Preliminary Statement

This is an antitrust action brought on behalf of National Auto Brokers Corp. ("Nabcor") and several of its affiliates. Nabcor sought over \$3,600,000,000 in damages—before trebling.

Nabcor was the originator of a Ponzi-like franchising scheme, termed by one witness a "franchise rip-off." It "franchised" often inexperienced persons to act as "automobile brokers" and, in many cases, to sell additional franchises. It held out the promise of staggering and pyramiding profits—up to \$1 million per year—for nominal investments.

In theory, the brokers franchised by Nabcor would solicit orders for new cars from consumers and send the orders to Nabcor. On receipt of an order and a deposit, Nabcor would then buy a car to fill the order from a manufacturer-franchised dealer and resell the car to the broker's customer. Cars were ordered only to fill specific orders; they were not held in inventory.

The Nabcor operation was a dismal failure. More than half of its 145 brokers ordered no cars at all during the four-year period relevant here, and 87% ordered ten or fewer. All of Nabcor's brokers submitted a grand total of only 677 orders over more than four years—an average of $\frac{1}{2}$ to 1 order per broker per year and about $\frac{1}{500}$ th of 1 percent of the 35.6 million new automobiles sold in the United States during that period.² In short, despite its claims of uniqueness, Nabcor was simply a bad idea whose time never came. Far from being a threat to the U.S. automobile industry, as it would now portray itself, Nabcor was of no real significance.

In late 1970, Nabcor was faced with the need to explain its failure in a number of lawsuits brought against it by

2. The data on total automobile sales are for the years 1967-70, inclusive, and are taken from *Automotive News, 1971 Almanac*, of which the Court may take judicial notice. FED. R. EV. 201; see also FED. R. EV. 803(17). *Accord*, E1278.

victims of its franchising scheme. It commenced this action on December 10, 1970—several years after most of the events complained of below—and promptly issued an offering circular for Nabcor stock, with 21 percent of the proceeds of the offering to be used to finance this litigation.

The main thrust of the claim below was the assertion that General Motors Corporation ("GM") and various GM dealers conspired to "prevent Nabcor . . . from getting cars . . ."—the so-called "blacklist" theory. But undisputed evidence established that plaintiffs obtained hundreds of automobiles from GM dealers—substantially all of the automobiles they wanted over the entire period relevant to this action. Moreover, there was simply no basis on which anyone could reasonably have concluded that GM participated in a conspiracy to boycott Nabcor.

Apparently mindful of the weakness of its "blacklist" claim, Nabcor late in the trial and now on appeal has shifted its emphasis to its so-called "whitelist" theory. It asserts that GM's method of allotting new automobiles to GM dealers for sale to "fleet customers" involved a customer restriction which is unlawful per se.

The description of fleet allotments contained in Nabcor's brief is largely a work of fiction, unsupported by the record. But even if that description were correct, two things are plain. First, Nabcor never failed to obtain an automobile by virtue of any inability to obtain fleet allotments. The issue therefore is academic. Second, the GM system—even as described by Nabcor—involved no unlawful customer restriction. And while Nabcor had no case before the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977), that decision leaves no room for serious argument.

When the facade of plaintiffs' case is stripped away, there is nothing left. As the trial judge said at the end of the long trial, and after presiding over this case for more than four years:

"[A]s the case is analyzed, and I think analyzed by any objective person, the farther one gets, the deeper one gets, the more conclusive the proof is that there is simply no ground for recovery on the part of any of plaintiffs here" (A6394, TRADE CAS. at 70,526)

We make two final points here at the outset. Nabcor's brief in this Court is less an effort to assist the Court in fairly reviewing the action below than a last-ditch attempt to keep this case alive by any means. It ignores entirely the trial judge's careful analysis of all the evidence, and does not even attempt to answer his 65-page opinion. It relies on evidence which was excluded below—without contesting the evidentiary rulings and frequently without disclosing the fact. And it distorts and misrepresents the record to an extraordinary extent. We therefore ask that the Court be unusually skeptical of plaintiffs' claims concerning the evidence below.

Finally, we regret that the need to respond to plaintiffs' confusing, inaccurate and unfocused presentation has required us to file a longer brief than would otherwise have been possible. But we do not thereby suggest that this is a complicated case. There is a shortcut through the mass of evidence. The few legal issues here really are immaterial because it is plain that none of the plaintiffs ever was injured by any actions of the defendants. Points I(A), III, V(B), VI. If the Court is satisfied of that, it need not reach any of the other issues in this case.

Issues Presented

Among the issues presented are:

1. Whether the trial court erred in directing a verdict for GM, on plaintiffs' claim that GM's fleet allotment systems violated the antitrust laws, on the alternative grounds that:

(a) There was no evidence from which the jury could have concluded that plaintiffs were prevented

from obtaining automobiles by GM's fleet allotment methods; and

(b) GM's fleet allotment methods, on the evidence most favorable to plaintiffs, did not violate the Sherman Act as a matter of law.

2. Whether the trial court erred in directing a verdict for defendants, on plaintiffs' claims that GM conspired with certain automobile dealers to boycott the plaintiffs, on the alternative grounds that:

(a) The jury could not conclude that GM participated in a conspiracy to boycott the plaintiffs;

(b) The jury could not conclude that any of the plaintiffs was injured by the alleged conspiracy, as there was no evidence that they were unable to obtain automobiles by virtue of any collusive action; and

(c) The jury could not have found damages in favor of the plaintiffs on the basis of anything other than speculation.

3. Whether the trial judge erred in denying plaintiffs' untimely motion to disqualify him on the ground that the firm of which the judge was a member before going on the bench had represented GM on unrelated matters.

Statement of the Case

Nature of the Case

Nabcor, several of its brokers, and Frank and Anthony Maiorana, its principals, commenced this action in 1970 against GM, Ford, Chrysler, American Motors, the Cleveland Plain Dealer, the Philadelphia Bulletin, the Bank of Delaware, First National City Bank, the Niagara Falls Gazette, several Better Business Bureaus, and some 50 other defendants, including a number of automobile dealers franchised by GM and Ford. Although the 111-page com-

plaint (A48) originally contained 27 counts, involving alleged violations of almost every provision of the antitrust laws, the chief claim below was that the 63 defendants and 71 named co-conspirators—located from Maine to Florida to California—conspired to refuse to deal with Nabcor with respect to the sale of new automobiles, newspaper advertising and customer financing.³

The period relevant to this case is December 10, 1966 through December 10, 1970, which corresponds closely to the 1967-70 automobile model years. (A6336, A6350, TRADE CAS. at 70,511, 70,515)

Proceedings Below

Pretrial

The proceedings below were extensive. Plaintiffs conducted 44 depositions. Defendants conducted 19. Thousands of documents were produced on both sides. Judge Griesa held more than 40 pretrial conferences to narrow the issues and supervise discovery. A number of motions

3. Plaintiffs' brief does not challenge the judgment insofar as it dismisses most of the counts of the complaint and the claims of most of the plaintiffs.

All of the appellees in this appeal are defendants on counts 1 through 3 of the complaint, which allege claims under Sections 1 through 3 of the Sherman Act, 15 U.S.C. §§1-3, respectively. Plaintiffs conceded below a failure of proof on count 2 (A5792-93), and their brief does not contest the dismissal of counts 2 and 3. In any event, plaintiffs did not offer proof of essential elements of violations of Sections 2 or 3 of the Sherman Act. *See, e.g.,* FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977). Dismissal of counts 2 and 3 therefore should be affirmed.

GM, alone among the appellees here, was a defendant on various claims relating to automobile distribution practices which are alleged in counts 4 through 7 and 14 through 27 of the complaint. The trial court entered judgment for GM on all of those counts pursuant to a variety of pretrial and trial rulings. *E.g.,* National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620 (S.D.N.Y. 1974). Plaintiffs' brief does not challenge the dismissal of any of those counts. The judgment as to those counts therefore should be affirmed.

Finally, the dismissal of the claims of the plaintiffs other than Nabcor and General Auto Sales & Leasing Corp., a Nabcor broker located in Buffalo, does not appear to be contested. In any event, these rulings are beyond serious dispute. Point VI, *infra*.

were litigated below.⁴ Nabcor took one appeal to this Court; it was dismissed from the bench.⁵

Shortly before this case came to trial, plaintiffs requested severance of all defendants not connected with or franchised by GM, thus acknowledging that they had no evidence of a conspiracy among different automobile manufacturers and crossing industry lines. (R777; R778; R787; R783 at 2-22; R769; R782 at 4 and *passim*; *accord*, A5771-72)

Plaintiffs' pretrial brief revealed that most of plaintiffs' proposed evidence would be hearsay testimony about inculpatory statements allegedly made by GM employees, many of them unidentified or deceased. Plaintiffs proposed to prove these alleged statements by having Frank Maiorana of Nabcor, or one of the other plaintiffs, testify as to conversations with various automobile dealers in which he claimed that the dealers had told him that a GM employee had made inculpatory remarks. (*See* A2233-34; R759; A1949-2123) Plaintiffs relied entirely on the co-conspirator exception to the hearsay rule in support of the admissibility of this suspect evidence.

The trial court recognized that alleged co-conspirator hearsay may be received in evidence only upon a determination by the court that the proponent of the evidence "has proved participation in the conspiracy by the de-

4. The following decisions in this case have been reported: 1976-2 TRADE CAS. ¶61,211 (1976); 1974-2 TRADE CAS. ¶75,281 (1974); 1974-1 TRADE CAS. ¶75,040 (1974); 376 F. Supp. 620 (1974); 60 F.R.D. 476 (1973); 1973-1 TRADE CAS. ¶74,405 (1973); 1971 TRADE CAS. ¶73,726 (1971); 1971 TRADE CAS. ¶73,729 (1971); 332 F. Supp. 280 (1971). In addition, decisions denying one of plaintiffs' class action motions, denying two motions for preliminary injunctions, and passing on several motions for partial summary judgment are unreported. (*E.g.,* A844-59; R903 at 61-69; A1858-65; A2229-31)

5. National Auto Brokers Corp. v. General Motors Corp., No. 75-7196 (2d Cir. May 27, 1975) (A1911). The appeal was from the denial of a motion for a "preliminary injunction" restraining GM and its attorneys from interfering with Nabcor's efforts to extract "settlements" from other defendants.

fendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances"⁶ (A2233-38) Since most of plaintiffs' evidence of conspiracy consisted of alleged co-conspirator hearsay, the trial court held an eight-day evidentiary hearing in October 1976 for the purpose of determining the admissibility of that evidence. (A2233-2857) At the close of the hearing, the trial court ruled that the plaintiffs had failed to establish the alleged conspiracy by a preponderance of the non-hearsay evidence. In consequence, the court held plaintiffs' proposed co-conspirator hearsay to be inadmissible. (A2841-57) The court stated:✓

"[T]he very substantial preponderance of the evidence on this hearing . . . is in favor of General Motors, positively negating the inference of any conspiratorial activity.

* * *

"The main point that I think should be emphasized is this: in my view it would be a travesty to permit Frank Maiorana and other witnesses connected with the plaintiffs to get on the stand and simply parade before the jury a lot of statements by out-of-court people which people are supposed to have heard General Motors say this and that, and have seen General Motors do this and that. If the plaintiffs wish to bring in people with knowledge of the events and direct knowledge of General Motors' statements and actions, that is another story." (A2845-46, A2856-57)

Plaintiffs have not challenged Judge Griesa's ruling on the admissibility of the co-conspirator hearsay on this appeal.

6. *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). *Accord, e.g., United States v. Stanchich*, 550 F.2d 1294, 1299 & n.4 (2d Cir. 1977); *United States v. Petrozziello*, 548 F.2d 20, 22-24 (1st Cir. 1977); *United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977). *See generally* prehearing memorandum of General Motors defendants (R812).

The Trial

The trial began before a jury on October 20, 1976 and continued until December 6, 1976. Plaintiffs' case consisted of their own testimony, the testimony of twelve automobile dealers or dealer employees—all of whom flatly denied every element of plaintiffs' charges—and some deposition testimony, chiefly of GM employees.

On November 23, 1976—five weeks after the trial began—plaintiffs moved for a mistrial and to disqualify Judge Griesa on the ground that the judge's former law firm, Davis Polk & Wardwell, represented GM at the time the judge left that firm to go onto the bench. Judge Griesa denied the motion.⁷ (A5335-36)

At the close of plaintiffs' case, Judge Griesa heard five days of oral argument on defendants' motions for a directed verdict. (A5737-6326) During the argument, Judge Griesa reviewed detailed computer analyses of the history of plaintiffs' new car purchases and tabulations showing all orders received by Nabcor from its brokers. He examined the evidence pertaining to every car order which Nabcor claimed was not filled by reason of alleged actions of the defendants.

On December 6, 1976, Judge Griesa granted all defendants' motions and directed a verdict dismissing all remaining counts of the complaint as to each plaintiff. Judgment was entered on December 16, 1976. (A6398-99)

The Facts

The trial court's 65-page opinion granting defendants' motions for a directed verdict, we submit, is so complete, so eminently fair and so accurate a summary of the evidence that there is no need for us to repeat what has been already said so ably. Hence, we respectfully invite the Court's

7. Six days later, plaintiffs submitted an affidavit and certificate of counsel in support of their motion. (A5600-05)

attention to Judge Griesa's opinion. For the Court's convenience, we are filing herewith as a supplementary appendix a copy of that opinion which we have annotated with appendix and record references demonstrating the correctness of every statement in Judge Griesa's opinion.

In view of the trial court's opinion, we will merely elaborate on four points here.

Nabcor's Undisputed Success in Obtaining GM Cars

In granting the directed verdict below, Judge Griesa said: "The most salient factor . . . positively rebutting any inference of boycott or Black List conspiracy" was the fact that Nabcor obtained substantially all of the cars it ordered during the relevant period. (A6350-78, TRADE CAS. at 70,515-22) This conclusion is substantiated by Nabcor's own records, the pattern of its automobile purchases, and its admissions. The undisputed proof was conclusive.

Nabcor's Records

Two independent trails through Nabcor's records establish its continuous ability to obtain GM automobiles.

In an effort to define Nabcor's claims, the trial court directed that plaintiffs produce lists of all instances in which they claimed they had problems in obtaining GM automobiles due to the alleged boycott. (A3874-80; A3918-20; A4325-36; Tr 2043-47; A4433-52; A4895-4902; A4945-47; A5176-80; A5315-35) Nabcor's list is PX 699 for identification.⁸ (E658-761)

PX 699 shows that Nabcor claims that it failed to receive only *two* GM automobiles in the last 3½ years of the four-year relevant period.⁹ (A 6350-51, TRADE CAS. at

8. PX 699 is not in evidence, as it was used simply to pin down what Nabcor's claims were. Comparable lists for the plaintiffs other than Nabcor were not furnished, despite the court's request. (A5316)

9. PX 699 listed also some claims for the post-December 1970 period. (E751-62) Plaintiffs conceded that these were outside the relevant period. (A6351, TRADE CAS. at 70,515; see A6255)

70,515; E749-50) There was no evidence that either of those two problems had anything to do with GM and Nabcor refers to neither on this appeal.¹⁰ And while Nabcor claimed to have had somewhat greater difficulty in obtaining automobiles in the first six months of the four-year period—December 1966 through May 1967 (E658-748)—there again was no evidence that GM had anything to do with any of those alleged problems. (A6359-71, A6373-75, TRADE CAS. at 70,517-22)

The second documentary basis for the trial court's conclusion that Nabcor was able to get all the cars it wanted also lies in Nabcor's records. Nabcor kept an order log, PX 450 (E93-147), in which, Nabcor stipulated, substantially all orders received by Nabcor from its brokers were entered. (A2943-44; A3607-13) The subsequent history of those orders—whether orders were placed with dealers, cars received, etc.—was contained to some extent in PX 450 and to some extent in other records maintained by Nabcor. (A4945-46; A5125-28)

GM entered all of the data concerning Nabcor's automobile transactions in a computer and produced—to the extent that data exist—a complete analysis of the history and disposition of every automobile order entered in Nabcor's log. The complete printouts are in evidence and were reviewed in detail by the court below. (DX A-9, B-9, C-9, D-9, E-9) The summary sheets are contained in the exhibit volumes of the appendix. (E1422-26; E1395) The table below summarizes the data:¹¹

10. The evidence is summarized in the trial court's opinion. (A6350-51, TRADE CAS. at 70,515; *see also* A5945, E749, A5303-04; A5842-52, E750, A3169-82, A3198-3209, A3822-27, A3945-66)

11. The confused state of Nabcor's records made precise determination of the number of vehicles delivered to Nabcor impossible. The best that could be done was to establish a range. (A4945-46, A5125-41) Most of the uncertainty relates to the 1967 model year. (*See* E1422-26)

SUMMARY OF GM CAR ORDERS RECEIVED
BY NABCOR FROM INCEPTION
THROUGH DECEMBER 10, 1970

Make	Total Orders Received by Nabcor from Its Brokers	Orders for GM Cars Marked "Cancelled" in Nabcor Log	Total Cars ¹¹ Delivered to Nabcor by GM Dealers	
			Minimum	Maximum
Chevrolet	178	19	154	182
Pontiac	176	8	162	182
Buick	98	8	80	95
Oldsmobile	36	2	28	31
Cadillac	65 ¹²	44 ¹²	13	13
	553 ¹²	81 ¹²	437	503

(Source: E1395, E1422-26)

Thus, at an absolute minimum, Nabcor obtained GM cars to fill over 79% of all the orders it received from its brokers. The true figure may have been 91% or higher.

With a handful of isolated exceptions, Nabcor offered no evidence that any of the orders marked "cancelled" in its log was cancelled due to inability to obtain cars or that any shortfall between the total orders received by Nabcor and the total number of cars delivered to it was attributable to any conspiracy.

The Pattern of Nabcor Purchases

The evidence regarding Nabcor's purchases of automobiles was far more explicit and detailed than even the

11. Same as footnote 11 printed herein at page 11.

12. Includes 43 orders allegedly placed with Colonial Cadillac in 1966. (E1395) See discussion in the trial court's opinion. (A6373-76, TRADE CAS. at 70,521)

summary statistics. The pattern of its dealings was abundantly clear.

Nabcor concedes that it normally sought only one or two dealers as sources of supply for each of the five GM makes in order to concentrate its purchases. (Pl. br. 21; A4092-94; A6358, TRADE CAS. at 70,517) The evidence demonstrated that it had at least those one or two sources at all relevant times.¹³

Typical of the proof below was that pertaining to Chevrolet. From the start of the relevant period through March 1967, Nabcor bought Chevrolets principally from Luby Chevrolet in Queens. (A2937-38; E798-99) While the jury could have found that Luby refused to continue selling to Nabcor in March 1967¹⁴ (A3661), there was no evidence that GM was responsible for any such decision. (A6360, TRADE CAS. at 70,518)

At about the same time Nabcor began ordering Chevrolets from a Philadelphia dealer, Matt Slap Chevrolet. (E802-03; A4112-14; E1224) Nabcor then bought Chevrolets from Matt Slap consistently from early 1967 until about August 1967. (E.g., E802-04) It is undisputed that Matt Slap Chevrolet never refused to fill any Nabcor orders except perhaps a single order for a Corvette, a limited production automobile (E1278; A3957-58). (A4113-20; PX 699, E658-761, *passim*; see E978)

In August 1967, Nabcor began buying Chevrolets from a Camden dealer, Rohrer Chevrolet. (A4118; E802-04; see E180) Between the fall of 1967 and July 1970, Rohrer sold Nabcor 95 new Chevrolets. (A4120; E1357-68) In about July 1970, Rohrer raised its "fleet" prices, including those to Hertz and Nabcor. (A3562, A3580-81) Nabcor and Hertz stopped buying from Rohrer (*ibid.*), and Nab-

13. DX G-9, H-9, I-9, J-9 and K-9 for identification (E1429-43) are charts drawn from data in evidence which graphically depict the pattern of purchases.

14. Nabcor also bought several Chevrolets from Luby in mid-1970. (E801)

cor began buying Chevrolets from Sloane Chevrolet, which was owned by Matt Slap's son-in-law. (A4121) Sloane admittedly never refused to sell to Nabcor. (*Ibid.*) Thus, as Anthony Maiorana admitted, Nabcor was able to get all the Chevrolets it wanted—whether from Luby, Matt Slap, Rohrer or Sloane—throughout the relevant period. (A4122)

As Judge Griesa's opinion demonstrates, much the same picture is presented for each of the other GM automobile divisions. (A6352-78, TRADE CAS. at 70,515-22)

Nabcor's Admissions

The evidence establishing Nabcor's ability to obtain automobiles is fully supported by Nabcor's own admissions. For example, in 1969 and 1970, Nabcor published a booklet which stated:

"In our fourth year of operation, Nabcor has experienced no difficulty in supplying its brokers with automobiles, nor does it anticipate any difficulty in the future" (E1267; see A3603-04)

When asked to explain this statement, Nabcor's president, Frank Maiorana, testified:

"We hadn't had problems locating dealers nationally. This is a national system, 42,000 dealers, and once a dealer stops us, *we could always get another dealer.* That is what I meant by that, your Honor. In that book. *We could always get a source of supply if it was stopped at one particular place.*" (A4050) (Emphasis supplied)

Another Nabcor publication stated in 1968:

"The Nabcor System is not only welcomed by a majority of the rapidly growing auto buying public, *but by the manufacturers as well*" (E1249; see A3928-29) (Emphasis supplied)

Testimony by Dealers

Nabcor called 12 witnesses affiliated with six different GM dealers which Nabcor claimed were pressured by GM not to sell to Nabcor. Each of those witnesses testified that GM never interfered with sales to Nabcor. Most testified that they never even refused to sell to Nabcor.¹⁵

The Failure of the Nabcor Broker "System"

The Nabcor "system" was a four-tiered franchise pyramid. (E1280-81) At the apex of the pyramid stood Nabcor, which performed two functions: selling franchises and buying cars from dealers to resell to customers found by Nabcor's franchised brokers. (A6338, TRADE CAS. at 70,512) The three lower tiers consisted of "master brokers," "area brokers," and "brokers." (*Ibid.*; A3589) All of the brokers had the right to submit automobile orders to Nabcor. Master brokers and area brokers, however, were granted the right to sell additional Nabcor franchises, generally in numbers limited only by Nabcor's right to approve each sale. (*E.g.*, A3590; A3598; E843, ¶¶4, 7; E1312-13, ¶¶8, 24)

Between the start of Nabcor's operations in early 1966 and December 10, 1970, Nabcor sold between 145 and 250 franchises at prices ranging from \$5,000 to \$50,000. (A3592-94; E1280-81) The uncertainty in the number stems from the fact that, although Nabcor usually claimed to have sold 200-250 franchises (*e.g.*, A3607; A50), it was able to identify only 145 franchisees at trial. (DX X-5, E1240-46; A3926-27)

The brokers franchised by Nabcor obtained very few automobile orders. Sixty-eight of the 145 brokers never submitted a single order.¹⁶ (A6344, TRADE CAS. at 70,513;

15. A3516; A3521; A4203; A4257; A4278-79; A4349; A4351; A3353-55; A3304-05; A3577, A3581, A3527-28; see A4295-96; A4317

16. If there were more than the 145 brokers identified at trial, none of these others ever ordered a single car.

E1410) One hundred twenty-six—or 87%—submitted less than ten. (*Ibid.*) And only eight submitted more than 20 orders. (*Ibid.*) Indeed, the total number of orders Nabcor received from its brokers from the commencement of its business through December 10, 1970 was 677—an average of about $\frac{1}{2}$ to 1 order per broker per year. (E1410)

There was no evidence that the failure of the brokers to submit more orders was attributable to actions of GM or other defendants. (A6344, TRADE CAS. at 70,513)

In view of this failure of proof, this Court need not concern itself with the reasons for the brokers' failure. Yet one need not look beyond the four corners of this record for at least some of the reasons.

Nabcor unabashedly directed its franchise sales efforts largely at inexperienced people. (*E.g.*, E1377, E1372) It promoted its franchises by holding out promises of spectacular, pyramiding profits for nominal investments. (*E.g.*, A4836-37, E1250) It repeatedly stressed that no overhead was required to earn these enormous sums, telling prospective buyers that they needed no showroom, no inventory, no experience, no employees, and even no office; they could make tens or hundreds of thousands of dollars in their spare time from their homes. (E1377; E78; DX D-6, *passim*, E1251 *et seq.*; A4836-37)

Examples of these "come-ons" abound in this record. Dale Strimple and Donald Bolling bought their master broker franchise upon being told by Frank Maiorana that they would make at least \$900,000 to \$1 million in the first year on their \$25,000 investment. (A4836-37) And Nabcor's newspaper advertising echoed the same refrain. (E1371-72, E78, E1377)

These promises of huge profits were made despite the fact that the vast majority of Nabcor's brokers ordered substantially no cars—and therefore could not have been earning anything. In fact, Frank Maiorana admitted in substance that the "profit projections" passed out to

prospective brokers had no basis in fact.¹⁷ (A3613-18, A3629-42)

As outrageous as these sales methods were, they hardly compare with the fraud inherent in the Nabcor concept of an automobile broker franchise.

To the extent that the Nabcor brokers took consumers' orders for cars and passed them on to Nabcor, the "brokers" were little different than the "bird dogs" to whom many automobile dealers have long paid \$25 or \$50 for referring customers to them. The only difference was that the Nabcor "brokers" paid Nabcor \$5,000 or more for the privilege and perhaps wrote out the order form. (A3350-51)

To the extent the Nabcor brokers were sold the hope of recouping their investments and making thousands of dollars by selling still more franchises, sometimes in unlimited numbers, the whole operation was essentially a familiar Ponzi scheme or chain letter con game.¹⁸

It is no wonder that so few of the Nabcor brokers ever ordered a car, and no wonder that a number ultimately brought fraud and breach of contract actions against Nabcor. (*See, e.g.*, A5553-55)

Claims of the Plaintiffs Other than Nabcor

Nabcor's claims and those of the other plaintiffs have almost nothing in common.

17. In the same vein, Nabcor sought to create the false image that it was a large and solvent organization. For example, as part of its sales operations, it showed prospective franchisees copies of a wildly inaccurate Dun & Bradstreet report which quoted Nabcor as stating it had annual sales of \$13 million, annual profits of "low to moderate six figures," and a net worth of \$650,000 as of May 2, 1967. (DX WW, at E912-13; A4582-83; A4837-43) In fact, at that time, Nabcor had annual sales of less than \$300,000, substantially no profits, and a negative net worth. (A3644-61)

18. *See, e.g.*, Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1178-82 (1975); Holiday Magic, Inc., 84 F.T.C. 748, 1035-38 (1974).

Nabcor's case involves its so-called "whitelist" theory and an alleged boycott conspiracy in the New York City and Philadelphia areas, primarily in the period December 1966 through May 1967. (See A5499; A6351-78, TRADE CAS. at 70,515-22)

General Auto Sales & Leasing Corp. ("General") was a Nabcor "master broker" in Buffalo, New York. General's sole claim was that GM and the Buffalo area defendants¹⁹ conspired to refuse to deal with General from roughly September 1967 through the end of that year. The claim is completely divorced from Nabcor's both geographically and in time. Point V, *infra*.

The claims of the remaining plaintiffs fall into two categories. First, there are individual claims by Frank and Anthony Maiorana of Nabcor and Dale Strimple of General. (A99; A57) No evidence was offered in their support. Second, Alfred J. Young, Ralph Ajello (as administrator of the estate of H. Louis Jamele), and Nabcor of East New York, Inc.—all Nabcor brokers—sued for profits allegedly lost by reason of the alleged conspiracy. (A99) Little evidence was adduced in support of those claims. It is summarized below. Point VI, *infra*.

GM's "Fleet" Activities and Their Relationship to Nabcor

As the trial court concluded, the details of GM's fleet activities are immaterial to disposition of this case. A few general points, however, are helpful in understanding some of the evidence below. And since plaintiffs' brief is so misleading in this area, we pause briefly to describe the important features of "fleet allotments," "fleet user certificates," and "fleet plans"—the GM activities mentioned below.

19. Gillogly Chevrolet, Inc.; Niagara Frontier Automobile Dealers Association, Inc. (f/k/a Buffalo Automobile Dealers Association); Bob Bain Chevrolet; Paul Batt Buick, Inc.; and Glen Campbell Chevrolet, Inc.

Fleet Plans. Fleet plans were programs used by GM's Chevrolet, Pontiac, Buick and Oldsmobile divisions in the 1967-70 model years. Their only feature relevant here was that dealers could receive from the relevant GM division a \$50 payment, commonly called a "fleet allowance" or "fleet rebate," for each car sold to a "qualified fleet user."²⁰ (A3399-3400; A5252-53; E1097-1116) The purpose of the fleet plans was to assist GM dealers in competing with Ford, Chrysler and AMC dealers for sales to qualified fleet users. (A5250-53)

Nabcor concededly was not a qualified fleet user, and dealers therefore were not eligible to receive fleet allowances on cars sold to Nabcor. (See A3067-68; A4065; Tr 54) Plaintiffs abandoned at trial any claim that the fleet allowances were illegal.²¹ (A6142, A6152)

Fleet Allotments. During the relevant period, GM's Chevrolet, Pontiac, Buick, Oldsmobile and Cadillac divisions each had its own unique system for distributing automobiles to its dealers. (A5254) Each division allotted most of its car production among its dealers. And each division was encouraged to set aside some part of its total production for sale to dealers to supply fleet customers or, in the case of Cadillac, leasing and rental companies. (*Ibid.*; A4204-07) The amounts thus set aside were referred to as fleet allotments, fleet reserves (Chevrolet), or leasing allotments (Cadillac).

20. A "qualified fleet user" was "any commercial, leasing and/or rental company which ha[d] purchased or leased ten (10) [20 in the 1967 model year] or more new cars or trucks solely for use in its operations during the current calendar year, preceding calendar year, or preceding 12-month period, and licensees of a nationwide daily rental system." (E1100; A3399-3400; A3054-58)

21. The complaint had alleged that the fleet plans violated the Robinson Patman Act. (A126-27; see, A109-11) That claim was untenable, a fact underscored by *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 1116 (1977). Hence, plaintiffs did not object to the court's instruction to the jury that plaintiffs did not claim the fleet plans were illegal (A3254-57) and conceded that they had failed to make out a *prima facie* case of any Robinson Patman violation relating to the fleet plans. (A5743-61; A5763)

The purpose of these allotments, insofar as there was any evidence below, was to assist GM dealers in competing with other manufacturers' dealers for sales to large users of automobiles. (A5250-54; *see* A5255, A5625) They were a competitive device designed to "run some lumps through the [distribution] channel . . ." (A5247)

Nabcor's description of these systems is most inaccurate. It distorts particularly the evidence relating to (1) the types of customers which were considered to be "fleets" for the purpose of making fleet allotments, and (2) the manner in which the GM divisions administered their respective systems.²² But only two points are significant to this appeal:

22. In fact, there was little evidence as to how fleet allotments were distributed and as to what was considered a "fleet" for allotment purposes. The evidence pertaining to Cadillac was a stipulation as to the practices in the 1966 and 1967 model years. (A4204-06) The only information as to Chevrolet's practices related to the period July 1969 through December 1970 and consisted of but a few pages of the Berg deposition. (A5611-44) The evidence as to Buick related only to the period up to August 1, 1968 and consisted only of a portion of the Rock deposition. (A5259-66, A5625-27; A5630-31) There was no evidence whatsoever concerning Oldsmobile fleet allotment practices. The evidence concerning Pontiac was limited testimony by two employees of a single Pontiac dealer and whatever inferences might be drawn from a couple of Pontiac internal memoranda. (A3281-82, A3307-08, A3309-14, A3352-53; A3377; A3436-38, A3478-88, A3495-96; E17-20) And the dealer employee frankly admitted that his testimony about Pontiac's practices was based on rank hearsay. (A3495) Contrary to Nabcor's suggestion (pl. br. 11-12), GM's national account list had nothing to do with allotments; it was a list of some companies that were "qualified fleet purchasers" for purposes of the fleet plans. (E334)

This paucity of proof was not attributable to the trial court's ruling precluding two of Nabcor's proposed witnesses, Kemp and Kelleher. (*See* pl. br. 14-15) Those witnesses were precluded because Nabcor failed to name them on its list of trial witnesses and GM therefore did not take their depositions and would have been prejudiced had they been called. (A3749-51; A5338-43; *see generally* A2142-47; *Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n, Inc.*, 380 F. Supp. 1382 (D. Conn. 1974)) The trial court did not abuse its discretion in so ruling, and Nabcor was not prejudiced in any event, as the proposed Kemp-Kelleher testimony was immaterial to Nabcor's case. *See, e.g., United States v. Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422 (8th Cir. 1964).

First, it is undisputed that the availability of fleet allotments to dealers was largely an academic issue, as it rarely affected their ability to obtain cars. Except when GM's production capability was insufficient to meet the demand for a particular model, the dealers were able to get all the cars they wanted and allotments were meaningless. (A5625; A3310; A4370; *accord*, pl. br. 8) More important, there was no evidence that any GM dealer had any difficulty in obtaining cars from GM for sale to Nabcor, via either a fleet or retail allotment. The evidence was entirely to the contrary²³ (A3313-14; A3487; A3549; A3580; A4373-76), which was not surprising in view of the small volume of purchases by Nabcor.²⁴

Second, there is no claim, and no evidence, that GM dealers were prevented from selling automobiles which they bought from GM to any customers of their choice. That was true of cars the dealers got from fleet allotments as well as retail allotments. Indeed, the only evidence on this point was that GM dealers were free to sell any cars they bought from GM to whomever they wished.²⁵ (A5257; A5664-65; A3281-82; *see* A5248)

Fleet User Certificates. The facts concerning GM's fleet user certificate program were stipulated in almost all material respects.

23. Indeed, there were no more than two occasions, so far as the record discloses, on which dealers requested fleet allotments for Nabcor. The dealers were Colonial Cadillac and Kline Pontiac. Kline apparently obtained fleet allotments for Nabcor. Colonial's request was submitted late. The Colonial incident, moreover, is barred by the statute of limitations. *Infra*, n.27.

24. Nabcor bought as many as 10 cars from a single dealer in a single month only 4 times during the relevant period. (E1429-43)

25. Nabcor's brief does claim that "customers who purchased as GM-approved fleet accounts could do so only by agreeing not to resell the purchased cars for a 6-month period (E-6, 56)." (Pl. br. 11, 66) There is no competent evidence that any such restriction existed. The only evidence cited is (1) a vague reference in PX 74A (E6), a dealer association newsletter that was not received in evidence for the truth of the matters stated therein (A3285) and that antedated the relevant period, and (2) a completely irrelevant memorandum (E56).

Since at least as early as 1962, four years before Nabcor existed, GM has issued fleet user certificates to firms which purchased annually 20 or more new motor vehicles for use in their business.²⁶ (A3058-59) The fleet user certificate is simply a marketing device used by GM's marketing staff to develop relationships with potentially large customers and to assist in developing programs for selling to such customers. (A5250-51)

Contrary to the suggestion in its brief (pl. br. 9, ¶2), Nabcor conceded below that "there never was any condition that a person must have a fleet certificate" in order to buy cars distributed to dealers under fleet allotments. (A6226; *see also* E974, E856)

Although Nabcor made several efforts to obtain a fleet user certificate, it finally conceded at trial that it never met the qualifications for issuance. (Tr 30, A6142)

26. The benefits available to the holder of a fleet user certificate included: (1) eligibility of its personnel to attend GM training centers, which train mechanics, and (2) repair manuals and service bulletins with respect to General Motors vehicles. (A3060-62) In addition, GM dealers were eligible to receive a discount from GM on parts sold to fleet certificate holders. The dealers were free to pass on that discount, or not, as they saw fit. (3060-61)

A R G U M E N T

I

Nabcor's "Whitelist"-Fleet Allotment Claim Is Patently Insufficient

Nabcor's principal claim on appeal is that GM refused to provide its dealers with fleet allotments for sale to Nabcor and that it made such allotments only for sale to fleet users satisfactory to GM. (Pl. br. 66, *see id.* 8-10) It asserts that this alleged practice violates Section 1 of the Sherman Act. (*Id.* 66-67)

The directed verdict granted below on this point should be affirmed for any of at least three independent reasons:

First, there was no evidence that Nabcor's ability to obtain cars was affected by GM's allotment practices. Hence, Nabcor could not have been injured by those practices and their legal status is academic.

Second, this case was tried on the theory that GM's fleet allotment practices involved a customer restriction which was a per se violation of the Sherman Act under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). There was no evidence, however, that any such restriction was placed on GM dealers. The only evidence was to the contrary.

Third, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977), the Supreme Court overruled *Schwinn* and held that vertical restrictions on the customers to whom and the areas within which dealers may sell are to be assessed solely by the rule of reason standard. There was no evidence that GM's fleet allotment practices involved any unreasonable restraint of trade.

A. GM's Fleet Allotment Practices Had No Effect on Nabcor

The principal ground on which the trial court relied in dismissing the claim pertaining to fleet allotments was that

the fleet allotments had no effect whatever on Nabcor's business. The trial court said:

"I have concluded that the legal question about the right of General Motors to make fleet allotments in the way it did, and when I say the way it did, I am assuming the situation most favorable to plaintiffs here. I am . . . saying that that question is academic as far as this case is concerned, because there is absolutely no evidence that Nabcor failed to obtain any cars in any specific transactions because of problems of allotment.

"In other words, there was a lot of discussion about the fleet allotment, fleet certificates in a very theoretical manner, but when it came to evidence about the allotment problem which prevented Nabcor from getting any cars, I don't find any such evidence at all.

* * *

"[T]his entire problem of fleet allotment is simply academic in the present case because there is no evidence whatever that any cars were denied to Nabcor because of the failure of any dealer to obtain a fleet allotment for such cars." (A6335-36, A6379, TRADE CAS. at 70,511, 70,522)

The trial court was correct.

To begin, there was no evidence that Nabcor failed to obtain even a single automobile because the dealer could not obtain a fleet allotment for Nabcor from GM. With two insignificant exceptions, there is not even any evidence as to whether the dealers with which Nabcor dealt even asked GM for such an allotment.²⁷ Indeed, there is virtu-

27. The first incident was a request by Colonial Cadillac in April 1966 for a rental and leasing allotment of 1966 Cadillacs for Nabcor. (E2-3) There was no evidence that Cadillac ever responded to this request, and it was stipulated that rental and leasing allotments for 1966 Cadillacs were made in the fall of 1965 and never changed during the model year. (A4204-05) Hence, the request was months late. In any event, this incident was outside the relevant period and therefore is irrelevant here.

The other incident relates to Kline Pontiac which, though the record is unclear, we assume *arguendo* sought fleet allotments of cars

(footnote continued on next page)

ally no evidence as to whether or not the hundreds of GM cars Nabcor did receive were provided to dealers under fleet allotments: For all this record discloses, Nabcor consistently bought fleet allotment cars—and Nabcor conceded as much below. (A6228-29)

At a more general level, the evidence is clear—and Nabcor concedes—that fleet allotments were meaningless except when GM's production capacity for a specific model was insufficient to fill the total demand promptly. (A5625; A3310; A4370; *accord*, pl. br. 8) Nabcor made no effort to show that any of the few orders which dealers failed to fill were placed when the particular models ordered were not in supply. Hence, the jury could not have inferred that any of the few failures to obtain cars were attributable to fleet allotment problems.²⁸

Near the end of the trial, faced with its total failure to support its claim that GM's fleet allotment practices prevented Nabcor from getting cars, Nabcor focused on a new theory. It asserted that its inability to obtain fleet allotments resulted in inordinate delays in filling its orders. (See A5585-99) And it seems to press that claim in this Court. (See pl. br. 8-9, 24-25, 41-42)

for sale to Nabcor. Initially, however, Kline refused to identify its customer to Pontiac. Pontiac therefore refused the request—though Kline delivered the cars to Nabcor out of its regular stock. Subsequently, Kline identified Nabcor as its customer, and fleet allotments were made for sale to Nabcor. (E17-20) While Pontiac's central office appears later to have questioned the action of its zone office in making the allotment (*ibid.*), there is no evidence as to whether or not Kline subsequently continued to receive fleet allotments for Nabcor. It is undisputed, however, that Nabcor got all the cars it ever wanted from Kline Pontiac. (A4140-42) Thus, it is plain that Nabcor did not fail to get cars from Kline due to any allotment problem and, moreover, that Pontiac's initial refusal to make a fleet allotment to Kline occurred because Kline would not identify its customer, not because the customer was Nabcor.

28. Nabcor's brief does imply that it failed to receive one or more Corvettes because dealers could not obtain fleet allotments of that model for Nabcor. (Pl. br. 8-9) This suggestion is disingenuous because it is undisputed that there were no fleet allotments of Corvettes. (Tr 1790)

Of course, Nabcor's failure to show that dealers even tried to get fleet allotments for it, much less that they tried unsuccessfully, is a complete answer to this claim. Moreover, Nabcor did not even offer evidence from which anyone could reasonably have concluded that it suffered any unusual pattern of delivery delays. (A6390-91, TRADE CAS. at 70,525) Its brief on appeal simply contains a hodgepodge of utterly meaningless statistics. The simple fact is that Nabcor itself admitted below that delivery delays, sometimes lengthy ones, often occur in the ordinary course of the automobile business (*ibid.*; E546), and it offered no evidence in support of the claim that the few delivery times which exceeded its conception of "normal" had anything to do with fleet allotments.

Nabcor's failure to demonstrate that GM's fleet allotment practices had any effect on its business demonstrates the insufficiency of its fleet allotment claim. A plaintiff in a private antitrust case must prove as an element of the cause of action that he was injured by the practices complained of.²⁹ Since Nabcor's business was not affected by GM's fleet allotment practices, Nabcor's business could not have been injured by them. Hence, Nabcor failed to make out a prima facie case on the necessary element of injury. In consequence, there was nothing to submit to the jury.³⁰

29. *E.g.*, *Gottesman v. General Motors Corp.*, 436 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 403 U.S. 911 (1971); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 909-10 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *Ovitron Corp. v. General Motors Corp.*, 512 F.2d 442 (2d Cir. 1975), *aff'g* 364 F. Supp. 944, 947, 948 (S.D.N.Y. 1973); *Carswell Trucks, Inc. v. International Harvester Co.*, 334 F. Supp. 1238, 1239 (S.D.N.Y. 1971); 15 U.S.C. §15; ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 262-65 (1975); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231, 232-40 (1961).

30. *E.g.*, *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976); *Shumate & Co. v. National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, *supra*, 297 F.2d 906 (affirming directed verdicts).

B. There Was No Evidence of Any Customer Restriction

Nabcor tried this case on the theory that GM's fleet allotment practices involved a customer restriction which was unlawful per se under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). As plaintiffs' counsel told the court below, the claim was (1) that GM dealers were not permitted to resell cars obtained on fleet allotments except to GM-approved fleets and (2) that GM would not make fleet allotments to dealers for Nabcor. (*E.g.*, A5167-73; A6135-37; A6144)

There was no evidence below that GM dealers were prevented from selling cars which they bought on fleet allotments—cars which the dealers owned—except to GM-approved customers. Not a single witness supported that assertion, and several testified that GM dealers were free to sell any cars they bought from GM to whomever they wished. (A5257; A5664-65; A3281-82; *see* A5248) Thus, there was no evidence of any customer restriction. Accordingly, there was no evidence from which the jury could have found a *Schwinn*-type antitrust violation.³¹

Since there was no evidence of any restriction on the right of GM dealers to sell fleet allotment cars to Nabcor or anyone else, Nabcor's claim boils down to the allegation that GM would not knowingly give fleet allotments to dealers except for sale to GM-approved fleet customers. In substance, Nabcor claims that the Sherman Act somehow required GM to provide its dealers with "extra" cars in order to make sales to Nabcor more attractive to the dealers.

31. Even if there had been proof of such a restriction, Nabcor's *Schwinn* claim would have been insufficient for another reason. This Court has held that customer and territorial limitations were not unlawful under *Schwinn* unless they were firmly and resolutely enforced. *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968). *Accord*, ABA ANTITRUST SECTION, MONOGRAPH 2, VERTICAL RESTRICTIONS LIMITING INTRA-BRAND COMPETITION 14-15 & n.38 (1977) and cases there cited. There is no evidence of any such enforcement in this record.

This claim is nonsense. GM had the right unilaterally to refuse to sell to anyone for reasons sufficient unto itself.³² It therefore necessarily had the right to refuse to provide dealers with "extra" cars except for distribution to customers who satisfied certain uniformly applied criteria designed to improve GM's ability to compete in the marketplace.

Nothing in *Schwinn* was to the contrary. *Schwinn* applied only where a manufacturer sought "to restrict . . . persons with whom an article may be traded after the manufacturer ha[d] parted with dominion over it." 388 U.S. at 379. Hence, refusals to sell, or to provide "extra cars," simply were not covered by *Schwinn*. The manufacturer had not parted with dominion over the article.

The Fifth Circuit's decision in *Weather Wise Co. v. Aeroquip Corp.*, 468 F.2d 716 (5th Cir. 1972), *cert. denied*, 410 U.S. 990 (1973), is closely in point. There a manufacturer refused to sell its product to resellers and even told its customers that they were not to resell the product themselves. The court held that the defendant's policy amounted only to a unilateral refusal to deal and therefore did not violate the Sherman Act. It expressly held that the manufacturer's refusal knowingly to provide its customers with product for purposes of resale did not offend *Schwinn*. 468 F.2d at 718.

The foregoing demonstrates that the trial court properly directed a verdict for defendants on this issue even under *Schwinn*.

32. Section 1 of the Sherman Act applies only to a "contract, combination . . . , or conspiracy . . ." 15 U.S.C. §1. Proof of concerted action by at least two persons therefore is essential to any Section 1 claim. Hence, a unilateral refusal to deal does not violate Section 1. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 108 (2d Cir. 1975).

C. There Was No Evidence of Any Unreasonable Restraint of Trade

Still another independent basis for affirming the judgment dismissing Nabcor's fleet allotment claim is the Supreme Court's recent decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977). There the Court explicitly overruled *Schwinn* and held that the legality of all vertical restrictions—including territorial and customer restrictions imposed on dealers by manufacturers—must be measured by the traditional rule of reason standard.

Despite GM's insistence that Nabcor's theory did not even amount to a *Schwinn* violation,³³ Nabcor elected to try this case strictly on a per se theory. In consequence, it offered substantially no evidence as to the history, purposes or competitive effects of GM's fleet allotment practices, all of which is essential to a rule of reason analysis.³⁴ In view of the complete lack of proof that GM's practices were unreasonable restraints, the dismissal of Nabcor's fleet allotment claim must be affirmed.³⁵ Indeed, the record evidence showed that the purpose of the fleet allotments was to enable GM better to compete with other manufacturers for

33. *E.g.*, memorandum of General Motors defendants in opposition to plaintiffs' motion for a preliminary injunction at 31-36. (R691)

34. *E.g.*, *Continental T.V., Inc.*, *supra*, 97 S. Ct. at 2557-63; *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1246-50 (3d Cir. 1975).

35. Contrary to Nabcor's suggestions (pl. br. 67-69), the burden of proving that a questioned practice is an unreasonable restraint of trade is on the plaintiff. *E.g.*, *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1193-94 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 2973 (1977); *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Alders v. AFA Corp. of Florida*, 353 F. Supp. 654, 657 (S.D. Fla. 1973), *aff'd mem.*, 490 F.2d 990 (5th Cir. 1974); *see Continental T.V., Inc.*, *supra*, 97 S. Ct. at 2562-63; *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967); *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 179 (1931). Indeed, Congress repeatedly has failed to enact Justice Department proposals to shift the burden of proving the reasonableness of challenged restraints to the defendant. *See generally* ABA ANTITRUST SECTION, MONOGRAPH 2, VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION 50-52 (1977).

sales to "fleet customers," precisely the sort of beneficial effect on interbrand competition which usually justifies vertical restrictions on intrabrand competition.³⁶

Finally, any thought that *Continental T.V., supra*, should not be applied here because it was decided after the decision below must be rejected for two reasons. First, the Supreme Court repeatedly has held that appellate courts must decide cases by applying the law as it exists at the time appeals are decided.³⁷ Hence, *Continental T.V.* applies here. Second, Nabcor elected to try this case on its *Schwinn* per se theory in the face of GM's long-standing contention that its fleet allotment practices did not involve any per se violation of the antitrust laws. Hence, Nabcor was on notice from the start that its fleet allotment claim might well depend on the rule of reason standard, but deliberately chose not to put in any proof relevant to a rule of reason claim. It is bound by its choice.³⁸

36. See *Continental T.V., Inc., supra*, 97 S. Ct. at 2560-61. The Supreme Court there recognized that both automobile manufacturers and the public have a legitimate interest in having automobiles distributed by dealers who provide service and repair facilities and engage in promotional activities which increase competition among different automobile lines. See *id.*, at 2560-61. Nabcor prided itself on the fact that it did not provide service, repair or brand-oriented promotional services. (E1251-72) As the Third Circuit said in its *en banc* decision in *Tripoli Corp. v. Wella Corp.*, 425 F.2d 932, *cert. denied*, 400 U.S. 831 (1970): "We are unconvinced . . . that the Supreme Court [in *Schwinn*] intended . . . that an automobile manufacturer using wholesale intermediate sellers must permit distribution of automobiles through beauty parlors or barber shops rather than through dealers offering appropriate pre-sale and post-sale service." 425 F.2d at 936 n.3.

37. *E.g.*, *Cort v. Ash*, 422 U.S. 66, 74-77 (1975).

38. Nabcor's position is similar to that of the plaintiff in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). In that Rule 10b-5 case, the plaintiffs elected to proceed on the theory that negligence was sufficient to satisfy the *scienter* standard in the face of defendants' contention that intent to defraud was necessary. See 425 U.S. at 190 & n.5. When the Supreme Court held for the defendants on that issue, it refused to permit plaintiffs to attempt to prove intent to defraud because they had elected to proceed solely on a negligence theory. 425 U.S. at 215.

II

The Trial Court Properly Directed a Verdict Dismissing Nabcor's Boycott Claim

Nabcor's brief asserts that a jury could have found a "conspiracy to prevent Nabcor and its brokers from getting cars . . ." (Pl. br. 69) Nabcor, however, has not favored this Court with an analysis of the record or otherwise supported its assertion. We all are left to guess at Nabcor's theory.

This problem has plagued this case for years. Nabcor repeatedly has blown up a sandstorm of charges, evidence, and legal theories, leaving it to the Court and defense counsel to sift through the clouds in order to determine whether there is any substance to Nabcor's claims. This was strikingly revealed during the argument of the directed verdict motion below. Plaintiffs' counsel, in response to the Court's request that counsel cite evidence supporting his claims, said:

"Mr. Kaplan and Mr. Kleinbard [defense counsel] should have done this for me, but I didn't hear anything like this. I would have thought they might have made the arguments for me and then torn them apart, but they are forcing me into making the arguments." (A6149)

This appeal evidently has not "forced" Nabcor "into making the arguments." The trial court issued a detailed, 65-page opinion which carefully explained why Nabcor's evidence, viewed by the appropriate standard,³⁹ did not

39. The trial court applied this Court's articulation of the standard in *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (A6333-34, *TRADE CAS.* at 70,511):

"The evidence must be 'such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,' *Brady v. Southern Ry.*, 320 U.S. 476, 479, 64 S. Ct. 232, 234, 88 L.Ed. 239 (1943). . . . 'If the facts and inferences point

(footnote continued on next page)

make out a *prima facie* case. But Nabcor's brief makes no serious effort to demonstrate that the trial court was wrong. It neither refers to the opinion below nor answers its analysis. It merely throws together a hodgepodge of references to the record—some in evidence, some not; some accurate, many not—and baldly asserts that there was a jury issue. But assertion may not be substituted for reasoned consideration of the record.

In view of Nabcor's approach, we here undertake a two-fold task. We try to discern Nabcor's theory. We also show that its theory is unsupported on any reasonable view of the record. We proceed to the evidence.

**A. There Was No Direct Evidence that
GM Conspired to Boycott Nabcor**

Nabcor does not appear to contest the trial court's statement that (a) there is no direct evidence that employees of GM at any level conspired to boycott Nabcor and (b) Nabcor's conspiracy case rests exclusively on circumstantial evidence:

"[T]here is absolutely no direct evidence at all that anyone at . . . the corporate level of General Motors . . . directed a boycott of Nabcor.

". . . [T]here is no direct evidence of any agreement among . . . [GM's] motorcar divisions . . . or within any single division—by any person or group of persons for the purpose of directing or carrying out a boycott of Nabcor or its system.

so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.' *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)." 522 F.2d at 742-43.

"The real question in the case relates to circumstantial evidence, because that's where the reliance is placed by the plaintiffs." (A6348-49, TRADE CAS. at 70,514)⁴⁰

Accordingly, we turn to the circumstantial evidence.

B. GM Acted in a Manner Inconsistent with Any Boycott Conspiracy

Before dealing with the scraps of circumstantial evidence upon which Nabcor seems to rely, we pause to note the enormous volume of uncontradicted evidence which negates Nabcor's essentially unsupported claim that GM engaged in a "conspiracy to prevent Nabcor . . . from getting cars" (Pl. br. 69)

1. *Nabcor's Success in Buying Cars.* It is undisputed that Nabcor bought 437 to 503 GM cars (E1395) from 27 different GM dealers (E1429-43) over the period December 1966 through December 1970. It claims that it failed to obtain only *two* cars by reason of the alleged conspiracy over the last three and one half years of that period. (A6350-51, TRADE CAS. at 70,515)

The trial court said, "The most salient factor . . . positively rebutting any inference of boycott or Black List conspiracy" was Nabcor's ability to obtain substantially

40. Nabcor's brief does refer to evidence that some GM employees, including Messrs. Donner and Roche, received a handful of reports about Nabcor—mostly prior to the four-year period at issue in this lawsuit. (Pl. br. 15-21, 37) There was no evidence that any of these reports led to any action by GM or, for that matter, that any of those who requested or received the reports ever had anything further to do with Nabcor. The trial court therefore properly regarded this evidence as not supporting Nabcor's conspiracy theory. It said:

"There is evidence that persons at high levels in General Motors were advised of Nabcor as a potential competitor of the dealers; but that is a perfectly legitimate business activity.

"It is perfectly legitimate for any business to keep advised of the competition, inform itself of the competition, and that activity, under no stretch of the imagination, in and of itself, can be called illegal" (A6348, TRADE CAS. at 70,514)

all of the GM cars it ordered during the relevant four-year period. (A6350-78, TRADE CAS. at 70,515-22) Far from demonstrating that Judge Griesa was wrong, Nabcor simply ignores this evidence. But the evidence may not so easily be ignored. It is inconsistent with the charge that GM was trying to "prevent Nabcor . . . from getting cars" ⁴¹

2. *Dealer Testimony.* Nabcor called twelve dealers and dealer employees as witnesses at trial. Each testified that GM never interfered with sales to Nabcor or, with two insignificant exceptions, even mentioned Nabcor. *Supra*, p. 15.

3. *Nabcor's Admissions.* Nabcor, as we have seen, made explicit admissions that it had no difficulty obtaining cars. Indeed, it said that Nabcor was "welcomed . . . by the manufacturers." *Supra*, p. 14.

4. *GM Employees Assisted Nabcor.* Nabcor offered evidence that GM employees assisted Nabcor and tried to satisfy its requests on several occasions. For example, Pontiac's New York zone manager, upon being introduced to Frank Maiorana in 1966, told him "'Sell a thousand cars . . . or as many as you can We are anxious to get rid of as many cars as we possibly can.'" (A2910-13)

* * *

41. Any notion that Nabcor was able to get these cars because GM knew nothing about it may readily be put to rest. There was no such evidence. Indeed, Nabcor's name was listed on at least a substantial number of dealer orders to GM. (DX B-7, E1353-54; DX D-7, at E1365-68) Nabcor itself told GMAC that it was buying from Matt Slap Chevrolet (E778-79), which never refused to sell. (A4112-20; see E978) GM knew that Nabcor was buying from Rohrer Chevrolet before Rohrer sold it 80-odd cars over the succeeding 31-month period. (E542B; E1357-68) Kline Pontiac obtained a fleet allotment from Pontiac upon stating that Nabcor was its customer (E19)—and Kline never refused to sell to Nabcor. (A4140-42) Other dealers applied for fleet allowances on cars sold to Nabcor (e.g., E1324-30; E542B), a process which required that Nabcor be identified. Hence, these dealers sold to Nabcor with GM's knowledge.

This uncontradicted evidence destroys the suggestion that GM conspired "to prevent Nabcor . . . from getting cars"

C. A Conspiracy May Not Be Inferred from Nabcor's Circumstantial Evidence

Nabcor relies on two lines of evidence: (1) a handful of comments allegedly made to the Maiorana brothers by GM employees, together with GM's awareness of Nabcor, and (2) the cessation of business relationships between Nabcor and a number of dealers. As the trial court concluded, this evidence was not sufficient to raise a jury issue. (See A6379-82, A6385-89, TRADE CAS. at 70,522-25)

1. Nabcor's Contacts with GM and GM's Awareness of Nabcor

Nabcor places nearly total reliance on six episodes involving contacts with GM or GM's awareness of Nabcor: (a) "GM's initial response to Nabcor" (pl. br. 15-21); (b) Nabcor's dealings with Midtown Chevrolet (*id.* 26-29); (c) Frank Maiorana's alleged conversations with George Zibold, a \$768 a month GM clerk (*id.* 37-38); (d) events relating to Rohrer Chevrolet in December 1967 (*id.* 39-42); (e) the tale of Nabcor's efforts to blackmail GM into issuing a fleet user certificate to Nabcor and obtain a loan from GMAC (*id.* 42-53); and (f) Frank Maiorana's alleged conversation with a Jack Douglas (*id.* 53).

These six incidents amount to nothing, even if plaintiffs' testimony is assumed to be true. That becomes particularly clear when the incidents are considered in historical context.

PX 699, Nabcor's specification of alleged refusals to deal, showed that all but two of its claims relate to events in the period December 1963 through May 1967. It presses neither of those on appeal. Hence, if there was any conspiracy at all, it was in that 1966-67 period, and it ended by June 1967.

A major difficulty with Nabcor's "circumstantial evidence"—the six incidents outlined above—is that almost all of them occurred after June 1967, and therefore after any problems Nabcor may have had were over. And the two earlier incidents to which Nabcor points simply do not support the conspiracy charge.

1966-1967 Incidents

(a) In the 1966-67 period, Nabcor relies chiefly on evidence that GM learned about Nabcor from various sources in the period April through December 1966. (Pl. br. 15-21) But there is no evidence whatsoever that GM did anything about Nabcor in that period. Not one of the many documents which Nabcor cites contains any GM-originated directions for action, threats, or anything of the sort. And as the trial court suggested below, the fact that a company is informed about competitors and developments in its industry is not evidence of conspiracy. *Supra* note 40.

(b) The second 1966-67 incident relied upon is the Midtown Chevrolet episode. (Pl. br. 26-28; A6361-63, A6380, TRADE CAS. 70,518-19, 70,522-23) Briefly stated, the evidence showed that GM bought Don Allen Chevrolet, a New York dealer, on December 12, 1966, and subsequently operated it as a branch of the Chevrolet division. (A2949-50) At the time of the acquisition, 10 or 11 Nabcor orders were pending with Don Allen. (A2947-49) The jury could have found that Midtown initially refused to fill the orders and that Walter Englert, a Midtown employee, and his boss said that Midtown would not release the cars to Nabcor because Nabcor was reselling the cars in competition with dealers. (A2953-56) But Nabcor concedes that Englert and his boss promptly changed their position and agreed to deliver all the cars. (A2958) Nabcor took delivery of two of the cars and cancelled the rest of the orders. (A2958-59, A3802-03, A3806-07, E815; A6361-63, A6380, TRADE CAS. at 70,518-19, 70,522-23)

Several points regarding the alleged conversations with Englert and his boss are relevant. First, even Nabcor's

version goes no further than showing that Midtown Chevrolet, one of a handful of GM-owned dealerships, did not wish to sell to resellers,⁴² not that GM was trying to prevent independent dealers from selling to Nabcor. Second, there was no evidence that Englert or anyone else at Midtown communicated about Nabcor with any other dealers or even with higher levels in GM's Chevrolet division. Third, both at the time of this incident and subsequently, Nabcor had no significant difficulties buying Chevrolets from other dealers.

The trial court concluded that the Midtown Chevrolet incident, even if Nabcor's version of the events were credited, was not probative of the existence of the alleged conspiracy. Judge Griesa stated:

"With regard to Chevrolets, the alleged statements of Englert and his boss were merely the statements of two persons at a factory-owned Chevrolet dealer. As to any evidence of some person or persons higher up in Chevrolet or General Motors directing a boycott of Nabcor, there is simply no direct evidence of such activities. Nor is there any sufficient circumstantial evidence which would permit a jury to find such a boycott at the time we are discussing—late 1966 and early 1967. The fact is that Nabcor purchased Chevrolets from Luby Chevrolet in Queens until early 1967, and then switched to Matt Slap Chevrolet in Philadelphia and A. C. Chevrolet in Jersey City, from whom Nabcor bought substantial numbers of Chevrolets through the end of the 1967 model year." (A6382, TRADE CAS. at 70,523)

Nabcor does not even suggest that Judge Griesa was wrong in this conclusion.

42. Of course, even if Midtown had refused to sell to Nabcor, Midtown "was simply a branch of General Motors, and General Motors has a right unilaterally not to sell Nabcor cars." (A6363, TRADE CAS. at 70,519) *Accord*, e.g., *Michelman v. Clark-Schwebel Fiber Glass Corp.*, *supra*, 534 F.2d at 1042; *Modern Home Institute Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 108 (2d Cir. 1975).

June 1967 and Subsequent Incidents

There is little reason even to go into Nabcor's contacts with GM from June 1, 1967, through December 1970, as Nabcor claims that only two orders were not filled by reason of the alleged conspiracy during that period. Hence, no matter what GM employees might have said during that period, there plainly was no conspiracy. In any event, the four incidents relied upon are insubstantial.

(c) The first episode is a series of conversations Frank Maiorana claims to have had in mid-1967 with George Zibold, a \$768 per month employee in GM's foreign distributors division. (Pl. br. 37-38) The competent evidence regarding these alleged conversations, however, is readily dismissed: it is not probative of a conspiracy.⁴³

(d) The next episode involves a meeting between two GM employees, Messrs. Speece and DiSimone, and Anthony Maiorana on December 13, 1967, as well as Nabcor's relationship with Rohrer Chevrolet of Camden, New Jersey. (Pl. br. 39-42; E37; A4061-66)

In late November 1967, Rohrer applied to Chevrolet for fleet allowances on cars it had sold to Nabcor. (E542B) On December 12, 1967, Chevrolet questioned whether Rohrer was entitled to receive these fleet allowances because it appeared that Nabcor was not a "qualified fleet user" under the Chevrolet fleet plan. (E26) It therefore

43. The testimony concerning these conversations appears at A2966-75. However, Judge Griesa granted GM's motion to strike most of it (A3043-45, A3013) on the ground that Nabcor failed to lay a proper foundation for admitting the testimony as an admission of a party under FED. R. Ev. 801(d)(2) and that Mr. Zibold was not shown to have been competent to make the statements attributed to him. (See A2983-98, A3004-06, A3013-14) Nabcor has not contested that ruling, which was correct in any event. See FED. R. Ev. 801(d)(2), 602; *United States v. Bensinger*, 430 F.2d 584, 594 (8th Cir. 1970); *Northern Oil Co. v. Socony Mobil Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 383-87 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, at 801-126 through 801-140 (1976); cf. *Northern Pacific Ry. v. Herman*, 478 F.2d 1167, 1171 (9th Cir. 1973).

asked its Philadelphia fleet representative, Speece, to contact Nabcor in order to check on its status. (*Ibid.*)

On December 13, Speece, accompanied by DiSimone, visited Anthony Maiorana, who told them that Nabcor was not interested in fleet allowances and that Nabcor was selling, not using, the automobiles it bought. (E37; A4063) As Nabcor was not using the cars in its business, it was not a "qualified fleet user" and Rohrer therefore was not eligible to receive fleet allowances on cars sold to Nabcor. *Supra*, p. 19.

Shortly after Speece and DiSimone visited Nabcor, Irene Hanlon of the Chevrolet zone office informed Rohrer that it was not eligible for fleet allowances on sales to Nabcor. (E542B; A3527-28) Ms. Hanlon said nothing about whether Rohrer should sell to Nabcor. (A3577)

As Nabcor conceded at trial, GM did not act improperly in making certain that fleet allowances were paid only on sales to firms meeting the standards established in its fleet plans.⁴⁴ Nabcor, however, claims that Messrs. Speece and DiSimone went farther.

Anthony Maiorana testified at trial that, during the course of his meeting with Speece and DiSimone, he told them that Nabcor was buying Chevrolets from Rohrer Chevrolet. (A4063-64) He claimed also that Speece later said that "dealers would not sell [Nabcor] any automobiles to resell" and that "they would see to it" that Nabcor would not get cars. (A4064)

The record is unclear whether Maiorana claims that Speece meant that "they," the dealers, or "they," Speece

44. The trial court instructed the jury, without objection, that "General Motors can have its requirements in order to qualify for that [fleet allowance], and it can be just as strict and ask for verification and check and do everything it wants to, as long as it is enforcing its requirements before it pays that \$50 discount. . . . If that's what is going on and that's what is presented to you, . . . that is just a business-type transaction and I don't think anybody claims it is illegal." (A3255)

and DiSimone, would see to it that Nabcor would not get cars. There is, however, no evidence that either Speece or DiSimone ever so much as discussed Nabcor with any dealer, including Rohrer Chevrolet, the dealer allegedly mentioned in the conversation with Maiorana. And it is absolutely plain that no one "saw to it" that Nabcor would not get cars, most particularly from Rohrer Chevrolet.

Rohrer Chevrolet sold Nabcor at least 95 Chevrolets between August 1967 and July 1970, at least 83 of them after the meeting at Nabcor's office. (E803-08; E1357-68) The general manager and the fleet manager of Rohrer testified that no one at GM ever discouraged Rohrer from selling to Nabcor, that Rohrer had no difficulty getting cars from GM for Nabcor and, indeed, that Rohrer never refused to deal with Nabcor. (A3579-81, A3577; A3521) Hence, there was no basis for inferring that Speece or anyone else at GM interfered with Nabcor's relationship with Rohrer Chevrolet.⁴⁵ Indeed, other Philadelphia-area dealers from which Nabcor was buying in December

45. Nabcor's brief asserts that "on 12/13/67, Rohrer was refusing to deliver any of the 10 cars ordered for Nabcor, 3 of which had been received by Rohrer (A4163-4, 4155-61)." (Pl. br. 40) This statement is not supported by the record. The jury could have found, on the basis of testimony at A4163-64, that Nabcor was unable to obtain delivery of 3 cars from Rohrer for unspecified reasons and for an unspecified time "[a]round the beginning of 1968." But there was no evidence of any other difficulties and no evidence of the reason for this brief problem. (The prior testimony at A4155-61 cited by Nabcor was used only for impeachment purposes and may not be considered on a directed verdict motion. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2529 at 573 [1971]; see *Olds v. Pennsalt Chem. Corp.*, 432 F.2d 1033 [6th Cir. 1970], cert. denied, 401 U.S. 1010 [1971].) In any event, PX 699 shows that Nabcor does not claim that Rohrer ever failed to deliver a single car that Nabcor ordered. (E658-761, *passim*)

Nabcor's claims of delivery delays at Rohrer Chevrolet at this time (pl. br. 40) are specious. The records of orders to Rohrer show that delivery times remained approximately constant over the entire three-year relationship. Most cars were invoiced to Nabcor within eight weeks of the receipt of Nabcor's order. A scattering were delivered in four or fewer weeks or more than eight weeks. (DX D-7, E1357-68)

1967 continued to sell without interruption or remained willing to deal.⁴⁶ (A6388, TRADE CAS. at 70,524)

(e) The next incident relied upon is a series of conversations from December 1967 through early February 1968 between Frank Maiorana of Nabcor and Edward P. Belcher and others at GM and GMAC—the fleet certificate episode. (Pl. br. 42-53)

Nabcor concededly never qualified for a GM fleet user certificate. (Tr 30, A6142) Nevertheless, it included an expired GM fleet certificate in the presentation book shown to franchise prospects. (DX WW, at E950-51; A4582-83; A4837) It also told prospective franchise buyers that “Nabcor gets their automobiles through the manufacturers in the same manner as Hertz or Avis or any of the other large fleet purchasers” (E1270) And it made several efforts to obtain a current GM fleet certificate despite the fact that its principals knew it was not eligible for it (*e.g.*, A3701-07)—doubtless for its anticipated value in selling franchises.

In December 1967, Frank Maiorana called GM's New York office and demanded to speak to Mr. Roche, then the chairman of GM's board. He was referred to and met with Mr. Belcher, a staff assistant. (Tr 403-04)

Maiorana testified that he told Mr. Belcher, and eventually Messrs. Karney and Fogg of GM, that Nabcor was having a number of problems with GM dealers and GM personnel, that Dale Strimple of General would complain to the Department of Justice unless GM took immediate action, that Maiorana did not want litigation, and that “Nabcor would not have to pursue these matters if Nabcor got a GM fleet certificate.” (Pl. br. 42-44, 47; A3070-78; A3101-03) The upshot of this extortion attempt was that Nabcor again applied for a GM fleet user certificate. The application for a fleet certificate was given due consideration, but was not accepted because Nabcor did not maintain a fleet of company-owned vehicles, which had been a qualification

46. *E.g.*, Matt Slap Chevrolet (E978; A4113-20); Al Wilson Pontiac (A4131-38; E1237); Bell (later Foy) Buick (A4105-12). (See PX 699, E658-761, *passim*; E802-08)

for issuance of a fleet certificate since at least 1962.⁴⁷ Maiorana refused to be specific about Nabcor's alleged problems.⁴⁸

For all the attention Nabcor devotes to this series of events,⁴⁹ there are only two relevant points to be made about them.

47. (E46-47; E53-54; E59-60; E64; E836-39) An interoffice communication between GM employees who reviewed Nabcor's application stated: "Inasmuch as the president of the subject company, Mr. Frank Maiorana states that there are no company-owned vehicles, I do not see how we could authorize a Fleet Agreement in this case. Seems to me it is somewhat similar to the Lily Tulip Company request which, you may recall, we have turned down within the past week on the basis that cars even though purchased by the company are registered in the names of the company employees who drive them." (E836)

48. In a letter dated January 26, 1968, Mr. Karney asked Mr. Maiorana to give specific details of Nabcor's complaints: "In your recent meeting with me, you remarked that some Chevrolet representatives had sought to induce dealers not to sell cars to your company but you refused to provide any details in this connection, although I asked you to do so. Any such conduct as that intimated, is contrary to General Motors policy as I informed you. General Motors is not in a position to investigate the circumstances which you may have had in mind, however, unless you furnish requisite details such as names or persons, places, dates and other circumstances allegedly involved. If you do not furnish such information, it can only be concluded by us that there is no basis to support the conduct alleged." (E64)

In his February 7, 1968 reply, Mr. Maiorana refused to be specific: "It seems apparent to me, that individual names need not be supplied to you in order to correct this condition. If you feel you can proceed no further on the information that you now have, our distributors, dealers, and ourselves will have to seek other avenues." (E67)

49. We include here Nabcor's application to GMAC for a loan through Matt Slap Chevrolet, a Philadelphia Chevrolet dealer, in early 1968. Although GMAC's Philadelphia branch initially recommended approval (E779), Nabcor did not obtain GMAC financing (A4061), which is hardly surprising inasmuch as Nabcor never even submitted a company financial statement to GMAC. (A4175; A6387, TRADE CAS. at 70,524) (The personal financial statement submitted by Frank Maiorana (E996-97) attributed virtually his entire net worth to ownership of stock in Nabcor and a swim club. No financial information on either was furnished. Maiorana's \$600,000 valuation of his Nabcor stock, moreover, was optimistic, to say the least, as Nabcor's liabilities exceeded its assets by over \$120,000 at the time. (E983-87; See E979-82))

First, none of the people Maiorana saw or spoke to is said to have admitted or acknowledged that GM was trying to prevent Nabcor from getting cars. At most, two expressed what might have been regarded as negative personal opinions of Nabcor. (See pl. br. 51)

Second, there is no evidence that any of the people Maiorana saw or spoke to, or anyone else at GM, did anything to interfere with Nabcor's sources of automobiles. Indeed, following Maiorana's visit to Belcher, Nabcor complains of only two car problems, and even Strimple acknowledges that he had no further problems with any GM dealers in Buffalo, assuming he had any at all. Hence, the Belcher, Karney, GMAC saga is a tempest in a teapot.

(f) Nabcor relies on only one other alleged communication with a GM employee. Frank Maiorana testified that in the spring of 1969 he spoke with Jack Douglas, whom he identified as an employee of Chevrolet's New York zone office, concerning a truck Nabcor had ordered from Queen City Chevrolet in Cincinnati, Ohio. (Pl. br. 53; A3165-67; Tr 535-36) Maiorana claims that Douglas said that he had directed Queen City not to deliver the truck because Nabcor was a "bootlegger" and that he would not approve the sale. (A3166-67) But even assuming the truth of Mr. Maiorana's testimony,⁵⁰ any possible inference of a conspiracy is thoroughly negated by the undisputed facts that (a) Queen City delivered the truck to Nabcor, (b) Queen City never refused to sell a truck or car to Nabcor, (c) Queen City never failed to deliver a truck or car which Nabcor ordered, and (d) Nabcor experienced no difficulty obtaining GM cars, either after this episode or during the two years preceding it. (Tr 555; see A6389, TRADE CAS. at 70,525)

2. Nabcor's Contacts with Dealers

Nabcor claims that a number of dealers initially sold to Nabcor, but then refused to make further sales. (Pl. br.

50. Nabcor makes no effort to explain why or how a Chevrolet employee in the New York zone would or could "approve" a sale by a dealer in Cincinnati. See *infra*, pp. 82-83.

30, 21-29, 53-55) It apparently contends that the jury could have inferred the existence of a conspiracy involving GM from these events. The evidence, however, supports no such theory.

To begin, there is no evidence that most of the dealers named in Nabcor's brief ever refused to sell. In most cases, the evidence showed only that Nabcor bought from the dealer for a time and then stopped—but there is no evidence of any refusal to deal.⁵¹ Indeed, in several instances, Nabcor admitted that it terminated its relationship with the dealer, often as a result of disputes with the dealer.⁵²

There are only a handful of dealers as to which there is competent evidence of any refusal to deal with Nabcor.⁵³

51. There is no competent evidence that any of the following dealers ever refused to sell to Nabcor, notwithstanding the contrary statements in Nabcor's brief: Bates Pontiac, Roger Penske Chevrolet (*compare* A4165-66 with A4175-76), Norton Chevrolet (*compare* A4166-67 with A4176-77), Kutner Buick, Pitcairn Oldsmobile, Krause Oldsmobile, Paragon Oldsmobile (*infra*, note 53), Kline Pontiac, Queen City Chevrolet, Cerota Chevrolet-Oldsmobile, Marty Motors (*see infra*, note 53), and the nine Ford dealers listed in Nabcor's brief (pl. br. 30).

52. There are many reasons why Nabcor may have stopped buying from a particular dealer. It stopped buying from at least two dealers because of price increases. (A4133-35; A3562, A3580-81) It stopped buying from at least two others because it claimed the dealers had delivered cars that did not meet the specifications of Nabcor's orders. (A.C. Chevrolet and Kutner Buick [A6365, A6370, TRADE CAS. at 70,519, 70,520]) And in at least one case, Nabcor stopped buying from a dealer due to a dispute between one of its employees and one of the dealer's employees. (A4117)

53. We briefly mention Nabcor's discussion of three other dealers: Nabcor refers to an alleged refusal to deal by defendant Paragon Oldsmobile (pl. br. 22-23) but fails to mention that none of the hearsay testimony it cites is in evidence against any defendant other than Paragon. It does not contest the trial court's ruling limiting this evidence. (Tr 218-22; A2922-26; A2931) Accordingly, there is no evidence on this record against any defendant other than Paragon concerning Nabcor's alleged problems with Paragon. We note also that the evidence, although admitted as to Paragon, did not make out a prima facie case even as to it. Nabcor simply never had any difficulty getting Oldsmobiles (A6354, A6370-71, TRADE CAS. at 70,516,

(footnote continued on next page)

—Luby Chevrolet, Midtown Chevrolet, Cunningham Buick, Rosenstock Oldsmobile, Colonial Cadillac, and Ruckle Pontiac. We have already dealt with Midtown,⁵⁴ and Luby, Cunningham, Colonial, and Rosenstock may be dismissed readily—there was no evidence whatever as to why they stopped selling to Nabcor and no evidence to connect GM with any refusal.⁵⁵ (A6364-65, TRADE CAS. at 70,518)

The Ruckle episode, which is dealt with at length in the trial court's opinion (A6366-68, TRADE CAS. 70,519-20), is equally insubstantial.

Ruckle Pontiac of Yonkers, New York, sold 23 cars to Nabcor between March 1966 and March 1967. (E798-99)

70,520-21) and therefore could not have been injured by any refusal to deal by Paragon. *See infra*, Point III. Furthermore, the alleged refusal by Paragon occurred in 1966. There was no evidence from which the jury could have found that it took place after December 10, 1966, and the claim against Paragon therefore is barred by the statute of limitations. (*See* A6110-22)

Nabcor claims also that Cerota Chevrolet (of Elmer, New Jersey) and Marty Motors (of Mt. Kisco, New York) insisted on billing or selling cars directly to Nabcor's customers (pl. br. 54-55); however, it offered no evidence that this had anything to do with a conspiracy involving GM. (*See* A6376-78, TRADE CAS. at 70,521-22)

In its discussion of Marty Motors, Nabcor asserts that the trial court "refused to admit" an exhibit which it refers to as "J-86." (Pl. br. 55) It fails to mention that plaintiffs never offered this document in evidence or even had it marked for identification. (The document was mentioned in a colloquy at A5063-70, but the colloquy related to another document, PX 678.) Hence, the trial court never ruled on its admissibility and it is not part of the record on appeal. In any event, the document was inadmissible hearsay.

Nabcor's allegation that the court refused to let plaintiffs call Mr. Kirsch "when plaintiffs made their request during trial" (pl. br. 55) is disingenuous. Plaintiffs' counsel made this request in a side bar during the direct examination of one of plaintiffs' witnesses. The trial court responded: "I'll consider that later." (A5070) Plaintiffs never mentioned the issue again and never tried to call Mr. Kirsch.

54. *Supra*, pp. 36-37.

55. The Colonial episode is unique in that Nabcor and the dealer disagreed as to whether Colonial failed to fill any Nabcor orders. But the dispute is immaterial because, as Judge Griesa said, there was no evidence connecting GM with anything that may have occurred between Colonial and Nabcor. (A6373-77, TRADE CAS. at 70,521)

Plaintiffs' brief incorrectly states that Cunningham Buick is "a GM division" (pl. br. 26); there is no such evidence in the record.

The jury could have found that Ruckle refused to fill nine Nabcor orders in February or March 1967. (Pl. br. 28-29, 23-25) Nabcor claims that this refusal was the product of a conspiracy with GM because Robert Dillon, Ruckle's present, had a conversation with John McNamara of Pontiac's New York zone office some time before Ruckle's refusal in which Nabcor was mentioned.

The only evidence concerning this conversation was Mr. Dillon's testimony, which was uncontradicted and unimpeached. He said that Mr. McNamara was a close personal friend who mentioned Nabcor during a social visit to Mr. Dillon's home in the fall of 1966. (A3326-37; A3353-54) Mr. Dillon testified that the entire conversation concerning Nabcor was the following:

"He asked me if I ever heard of an outfit called Nabcor and I said, 'No. Why? What makes you ask?'

"He says, 'We down in Pennsylvania and,' he says, 'my jerky brother-in-law is thinking of buying a franchise to sell automobiles,' and he says, 'Some outfit by the name of Nabcor is selling it. They want \$5000.'

"I says, 'I don't know anything about it, but,' I said, 'maybe I can find out.' " (A3334)

Mr. Dillon never spoke about Nabcor with Mr. McNamara again and never spoke about Nabcor with any other GM employee. (A3353-54)

After this conversation, Mr. Dillon asked Earl Stewart, Ruckle's Fleet Sales Manager, whether he had ever heard of Nabcor. Mr. Stewart replied that Ruckle was selling cars to Nabcor and explained Nabcor's broker franchise system. Mr. Dillon—realizing that Nabcor was in the business of charging brokers \$5000 for the privilege of bringing customers to Nabcor (A3350-51)—told Mr. Stewart to stop selling cars to Nabcor because: "I didn't want to be part of a franchise rip-off." (A3335-36) Both Dillon and Stewart testified that Ruckle's decision to stop selling to Nabcor was unilateral. (A3354-55; A3404-05)

On this evidence, a jury could not reasonably have inferred that Ruckle cut off Nabcor on orders from GM. There was no evidence that McNamara tried to prevent sales to Nabcor. And while a jury might have disbelieved Dillon's account of the conversation with McNamara, there still would have been no evidence of a GM-Ruckle conspiracy.⁵⁶ (A6367-68, TRADE CAS. at 70,520) As the Third Circuit held in affirming a judgment n.o.v. for defendants in a very similar case:

"While the jury was free to disregard [certain] testimony . . . , mere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975).

Moreover, as the trial court noted, any possible inference of conspiracy which might conceivably be drawn from this episode is negated by the fact that Nabcor had no difficulty obtaining Pontiacs subsequently. Nabcor placed all of the orders refused by Ruckle with Bates Pontiac, in Bronx, New York, and it obtained at least 18 cars from Bates between March and June 1967. (Pl. br. 29; E798-99) Both Bates and Ruckle were located in Pontiac's New York zone. And beginning in June 1967, Nabcor obtained every Pontiac it needed from Al Wilson Pontiac and Kline Pontiac. (E802-08; A4131-42) (*See* A6366-69, TRADE CAS. at 70,520)

Although there was evidence that only a handful of the dealers mentioned in Nabcor's brief even refused to sell to Nabcor, we need not rest on this alone. Even if all of

56. Nabcor's brief suggests that an October 1966 letter from the Greater New York Automobile Dealers Association which was received by Mr. Dillon and other dealers may have influenced Mr. Dillon's decision to stop sales to Nabcor. (E6-7; pl. br. 25, 29) This letter was not received in evidence for the truth of its contents but "solely as something which Mr. Dillon may have seen." (A3285) In any event, this letter is irrelevant to the case against the defendants before this Court, as there was no evidence connecting any of them with the letter.

the dealers refused to sell, there still would be no basis for inferring that there was a conspiracy, much less that GM participated in it. As the judge below recognized, there were too many innocent explanations of such conduct possible and, indeed, probable here. (A5351-52) For example:

(i) Nabcor and its brokers were competing with the dealers from which Nabcor tried to buy cars. Indeed, they were trying to buy from the dealers at cut-rate prices and then to undersell the dealers in the marketplace. As Nabcor admitted, dealers readily could have concluded that it was against their interests to sell to Nabcor.⁵⁷ And the problem was quite real, as Frank Maiorana's letter to Stewart of Ruckle Pontiac, written just days before Ruckle stopped selling to Nabcor, demonstrates:

"We understand that an unfortunate incident has occurred that had jeopardized our relationship with you and your dealer.

"As you know, it has never been our intention to create dealers in your area who would muddy up the profit potential of the retail end of your business.

"Our dealers have been instructed that under no circumstances are they to quote, write, or in any way to infer that they will deliver Pontiac automobiles for unrealistic prices; as I have pointed out to you upon numerous occasions that the concept for our dealers is to sell cars profitably.

"We can assure you that you have our word that we will police this matter to your complete satisfaction.

"For your own information, the two dealers that you have mentioned have promised that they will co-operate to the fullest extent." (E311)

57. Anthony Maiorana testified as follows: "Q And Nabcor of course was selling cars in competition with franchised dealers? A Yes. I would call it that. Q And the dealer could reasonably reach the conclusion on his own that it would be against his business interests to sell to Nabcor for that reason, couldn't he? A I imagine he could" (A4178-79)

Since Nabcor frequently passed itself off as a leasing company when approaching dealers to buy cars (*e.g.*, A4208, A4255, A4341-42; A4179-80; Tr 1920-21; A4313; *see* A4586), or promised dealers that it would not compete in their areas (*e.g.*, E311; *see* E978), dealers may well have started selling to Nabcor. But when dealers learned that Nabcor was reselling in competition with them, they may well have decided to terminate sales to Nabcor. (*See* A4255-57; A5351; A5096-98)

(ii) Nabcor promised dealers that it would buy large numbers of cars, usually 200 or more per year. (A4092-93; A3396-97; E171; E315; E908; E910) The promise of volume purchases was an inducement to obtain low prices. (A4092-94; A3396-98) But the promised volume never materialized. Nabcor never bought more than 43 cars from any dealer in any year, and its annual volume with most was 15 or fewer. (E1429-43) Some dealers may well have terminated Nabcor because the promised volume simply was not there. (*See* A5351; A3396-98; A6342, TRADE CAS. at 70,513)

(iii) At least one dealer stopped selling to Nabcor after Nabcor bounced a check. (A4316-17; A4320-23; *see* A5351)

Thus, this alleged boycott conspiracy boils down—after six years of pretrial proceedings and a long trial—to a handful of alleged refusals to deal. Most were completely unexplained, but were fully consistent with the self-interests of the dealers involved. The others were products of unilateral business decisions by the dealers involved.

3. The Evidence Was Insufficient to Raise a Jury Issue

The trial court properly considered Nabcor's circumstantial evidence together with the uncontradicted evidence unfavorable to its case.⁵⁸ In this light, the jury

58. *E.g.*, *Carlson v. American Safety Equip. Corp.*, 528 F.2d 384, 385 (1st Cir. 1976); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 & n.16 (5th Cir. 1969) (*en banc*); 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §2529, at 573 (1971); *see Simblest v. Maynard*, 427 F.2d 1, 5 n.3 (2d Cir. 1970).

could not reasonably have found that GM "conspired to prevent Nabcor . . . from getting cars"

The evidence pertaining to Nabcor's contacts with GM was patently insubstantial. No GM employee is said to have admitted participation in a conspiracy. And the only incidents in which GM employees are said to have expressed negative sentiments about Nabcor occurred at times when Nabcor admittedly was getting all the cars it wanted. These isolated alleged comments by GM employees, therefore, were insufficient to raise a jury question.

The Fifth Circuit's decision in *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, 488 F.2d 934 (5th Cir. 1974), is closely in point. The plaintiff there claimed that the defendants had conspired to terminate plaintiff as a distributor of a line of medical supplies. It offered evidence that one defendant had suggested to the other that the plaintiff's dealership be terminated. The court nevertheless set aside a jury verdict for the plaintiff, holding that the trial judge should have directed a verdict for the defendants. It pointed out that the alleged conversation took place over a year before the plaintiff's dealership was terminated and that there were legitimate business reasons for terminating the dealership. The court therefore held that the jury could not reasonably have found a conspiracy to terminate the dealership.

The evidence concerning Nabcor's relationships with various GM dealers and the handful of alleged refusals to deal is equally insufficient. There was no evidence that GM was responsible for any dealer's response to Nabcor. And since dealers could well have refused to sell to Nabcor in furtherance of their own self-interest, even after selling to Nabcor for a time, the jury could not have inferred any conspiracy, let alone a conspiracy involving GM.⁵⁹

59. *E.g.*, *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1047 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975); *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975).

And here, of course, there is more. Nabcor's continuous ability to obtain cars from a substantial number of GM dealers demonstrates beyond a doubt that GM could not have participated in a "conspiracy to prevent Nabcor . . . from getting cars"

In the last analysis, Nabcor's case failed below, and should fail here, because an overwhelming body of uncontradicted evidence demonstrates that Nabcor got substantially all the GM cars it ever wanted and that GM did not pressure dealers to refrain from selling to Nabcor. The bits and pieces of evidence to which Nabcor points simply cannot overcome this proof. It is well-established that a verdict for defendants is properly directed where a mass of uncontradicted evidence is inconsistent with the conspiracy which the plaintiff would ask the jury to infer from scraps of at best ambiguous evidence.⁶⁰ To hold otherwise would be comparable to saying that a man may be convicted of murder on a showing of means and opportunity—even if the alleged victim is alive and well.⁶¹ Accordingly, the trial court properly directed a verdict for the defendants, and the judgment below should be affirmed.

60. See, e.g., *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *Scott Medical Supply Co. v. Bedsole Surgical Supplies, Inc.*, 488 F.2d 934 (5th Cir. 1974); *Panotex Pipe Line Co. v. Phillips Petroleum Co.*, 457 F.2d 1279, 1289 (5th Cir.), *cert. denied*, 409 U.S. 845 (1972).

61. See generally 1 J. WIGMORE, EVIDENCE §§130, 135, 138 (3d ed. 1940).

III

There Was No Evidence that Nabcor Suffered Any Injury Caused by the Alleged Conspiracy

A private plaintiff in a treble damage action must prove, as an element of his cause of action, that he sustained injury to his business or property as a proximate consequence of the alleged antitrust violation.⁶²

Here Nabcor failed to adduce evidence from which the jury could have found that Nabcor was injured as a proximate result of the alleged conspiracy, even if it found that GM did participate in a "conspiracy to prevent Nabcor . . . from getting cars" The trial court therefore properly directed a verdict for defendants.⁶³

Again, Nabcor has not spelled out why it contends the element of injury, proximately caused, was made out. It appears, however, to urge that (a) it lost profits on specific automobile orders which dealers failed to fill; (b) its alleged inability to fill those orders led to the loss of brokers and, consequently, the profits Nabcor would have made on orders those brokers would have placed; and (c) its business ultimately failed. (Pl. br. 55-59) These alleged injuries range from the unproven to the fanciful.

A. There Was No Evidence of Cancelled Orders Caused by the Alleged Conspiracy

During the 1966-70 relevant period, Nabcor bought 437 to 503 GM cars from GM dealers. It plainly had no significant difficulties in getting cars even if there were a conspiracy. As Frank Maiorana testified:

"We hadn't had problems locating dealers nationally. This is a national system, 42,000 dealers, and once a dealer stops us, *we could always get another dealer.*"

62. *Supra*, note 29.

63. *Supra*, note 30.

That is what I meant by that, your Honor. In that book. *We could always get a source of supply if it was stopped at one particular place.*'⁶⁴ (A4050) (Emphasis supplied)

Hence, it is virtually impossible to see how Nabcor could have lost any orders.

We need not rest on this generality, however. As we have seen, viewing the evidence most favorably to Nabcor, only six dealers refused to sell to it: Luby Chevrolet, Midtown Chevrolet,⁶⁵ Ruckle Pontiac, Colonial Cadillac, Rosenstock Oldsmobile and Cunningham Buick. PX 699 for identification (E658-761) lists each order which Nabcor claims each of these dealers failed to fill by reason of the alleged conspiracy. And in each case, the orders concededly were filled by another dealer,⁶⁶ or there was no evidence that Nabcor lost a sale by reason of any failure to deliver,⁶⁷ or

64. There were not even significant delays in finding new dealers. Anthony Maiorana testified that it typically took Nabcor no more than 2 or 3 days to locate a new source. (A4168)

65. Midtown Chevrolet may be quickly put aside. While the jury might perhaps have found that 9 orders were cancelled as a result of Midtown's initial failure to deliver the cars Nabcor ordered, Midtown's action was a unilateral act of GM. As the judge below concluded, while that might amount to a breach of contract, it is not an antitrust violation. (A6363, TRADE CAS. at 70,519)

66. Eight of the nine orders rejected by Ruckle Pontiac and one of the two allegedly rejected by Luby Chevrolet were filled by Bates Pontiac and Matt Slap Chevrolet, respectively. The one order allegedly rejected by Cunningham Buick was filled elsewhere. (Ruckle-Bates: E728, E730, E732, E734, E738; compare E721 with DX D-9, p. 40; and compare E726 with E99-100, line 16. Luby-Matt Slap: E715; E98, line 11. Cunningham: E677; E119-20, line 32) There was no evidence that the ninth order allegedly rejected by Ruckle resulted in the loss of a sale.

67. There was no evidence that Rosenstock Oldsmobile in fact failed to deliver the one order claimed by Nabcor to have been undelivered. (E744) There was no evidence that one of the two alleged failures to deliver attributed to Luby Chevrolet (E704) in fact occurred; the failure allegedly took place months before Luby stopped selling to Nabcor. (Compare E704 with DX E-9, pp. 39-42, 44-45, 48-49, 52-56)

the dealer's action was undisputedly unilateral and therefore not attributable to any conspiracy involving GM.⁶⁸

Hence, there was no evidence that Nabcor lost a single car order as a proximate consequence of the alleged conspiracy.

B. There Was No Evidence that Nabcor Lost Brokers, or that It Would Have Had More Orders, but for the Alleged Conspiracy

Nabcor's claim that its brokers would have placed more orders, or would not have stopped ordering cars, but for the alleged conspiracy is totally unsupported.

Nabcor made no effort below to establish that any activities of the defendants interfered with the ability of its brokers to obtain orders from consumers. None of the plaintiffs so testified, and no non-party brokers or potential customers were called as witnesses. Hence, there was a complete failure of proof as to this possible type of injury. As the trial court said:

"Lest anyone think that General Motors or any of the defendants on trial here were somehow interfering with dealings between brokers and potential customers, there is no such evidence." (A6344, TRADE CAS. at 70,513)

Nabcor's brief does not dispute this statement.

Nor was there any proof that Nabcor's brokers went out of business or stopped ordering cars because Nabcor could not obtain cars. Not only did the evidence show that Nabcor had no real difficulty getting cars, and that the majority of brokers never even tried to order a car,⁶⁹

68. The uncontradicted and unimpeached testimony of the two witnesses from Colonial was that GM never communicated with Colonial about Nabcor. (A6373-78, TRADE CAS. at 70,521-22) Hence, even if there were a basis for inferring that GM conspired with some dealers, there was no basis for concluding that it conspired with Colonial, and any failures to deliver by Colonial could not have been caused by any conspiracy. See *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975).

69. *Supra*, pp. 15-16.

but there was just no evidence as to why Nabcor's brokers stopped ordering from Nabcor. As the trial court said:

"With respect to an allegation that certain brokers terminated because of problems related to General Motors, I note that any attempt to develop the reason why a particular broker did little business, did no business, or terminated doing business, would require specific analysis and evidence with respect to the activities of that broker.

"There has been no such analysis or evidence that could lead to the conclusion that any broker terminated on account of the activities of General Motors or the alleged conspiracy.

"I note that in a list of prospective witnesses supplied to the Court and to defense counsel during the trial, relating to additional witnesses to be called, there was a group of some dozen witnesses who were franchisees or connected with franchisees.

"None of them were called except the Donald Bolling of General. So this line of proof simply was not developed at all." (A6393-94, TRADE CAS. at 70,526)

Again, Nabcor does not claim that the judge was wrong.⁷⁰ (A3903)

Finally, any suggestion that Nabcor was hampered in its efforts to sell additional franchises is utterly unsupported. Nabcor conceded below that it did not lose any identifiable franchise sales due to inability to supply cars.⁷¹ (A3903)

70. *See Shumate & Co. v. National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 154-55 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) (loss of account following alleged antitrust violation insufficient to raise jury issue absent evidence of reason for loss).

71. Nabcor does state that its alleged inability to obtain automobiles in December 1966 and early 1967 forced it to lay off franchise salesmen (A2883, A5481) and presumably impaired franchise sales.

The evidence does not support the theory. Nabcor's franchise salesmen were paid exclusively on a commission basis. Nabcor did not even reimburse them for their expenses. (A4068-72) Hence,

(footnote continued on next page)

C. The Destruction of Business Claim Was Unsupported

Nabcor seems to assert that its business was destroyed by the alleged conspiracy. (Pl. br. 58-59)

The foregoing discussion is a complete answer to this claim. Nabcor lost no orders and lost no brokers as a result of any conspiracy. Hence, its business could not have been destroyed. But even passing this point, the claim is insufficient for another reason.

Nabcor did not go out of the automobile business until April 1973. (Tr 85) There was virtually no evidence as to what happened to Nabcor between December 1970 and April 1973, and certainly no evidence as to why it left the automobile business.⁷² Hence, the jury could not reasonably have found that the alleged conspiracy destroyed its business.

even if there were a cash flow problem caused by an inability to get cars—and there was no such evidence, much less evidence that the defendants caused such a problem—it would not have required that any salesman be laid off. (See also A6392-93, A6343, TRADE CAS. at 70,525-26, 70,513)

72. There was no evidence below from which a jury could have found that Nabcor failed in 1973 as a result of actions in the 1966-70 period. In the period June 1, 1967, through December 1970, Nabcor itself claims that only two cars were not delivered. It earned profits in the fiscal years ended January 31, 1968 (DX MMM, at E988), 1969, 1970, and 1971 (DX F-6, at E1296), earning over \$104,000 in the 1971 fiscal year. It made a successful public offering of stock in early 1971. (DX F-6, E1273 *et seq.*) And in 1971, it announced: "The Company is now able to deliver new automobiles of any make and model . . . without any material difficulties." (E1279) In short, if Nabcor did fail in 1973—and there is reason to believe that it simply decided to go into the real estate business (A856)—the jury could not reasonably have attributed the failure to anything that occurred in the relevant period.

IV

Nabcor's Damage Theories Were Speculative and Not Supported by Evidence. The Jury Therefore Could Not Properly Have Awarded Damages

The directed verdict granted below should be affirmed for a third independent reason. This was one of those rare cases in which the plaintiff failed to adduce evidence from which the jury could have awarded damages on any rational basis, even if there had been evidence of an anti-trust violation that injured Nabcor.

Nabcor's basic problem here is that it has tried to use this lawsuit as a means for finding the proverbial pot of gold at the end of the rainbow, rather than to obtain just compensation for its imagined grievances. In consequence, it has proposed one outlandish damage theory after another, each supported by a multiplication table instead of evidence.

This case began with a complaint that sought damages in excess of \$100,000,000 on behalf of a large class. (A131-40) During pretrial proceedings, class action treatment was denied and Nabcor subsequently increased its claim to more than \$3,600,000,000. (E1342-44) And even at trial, when Judge Griesa required Nabcor to submit a detailed statement of the amount and elements of its damage claim, Nabcor submitted an entirely fanciful \$35,000,000 claim. (Court exhibit A, E1444-47)

Two simple facts demonstrate the irresponsible nature of Nabcor's damage theory: (1) the entire Nabcor broker system generated only 677 automobile orders over four years, an average of less than one order per broker per year, and (2) Nabcor's gross profit per automobile was not even intended to exceed \$50. (E1410; A2875) As Judge Griesa said in his opinion below:

"Damage theories have been proposed about the loss of huge amounts of automobile and franchise sales. Without going into detail, I simply state that

these theories involve projections which have no relation to reality." (A6393, TRADE CAS. at 70,526)

The completely unsupported nature of Nabcor's damage claim is demonstrated by a review of the transcript of the conference regarding damages held by Judge Griesa during the trial (A3833-3917) and by a brief analysis of the elements of damage set forth by Nabcor in response to the trial court's direction (A3735-38, A3753, A3829-32)—court exhibit A.

1. A major element of claimed damages was over \$9,000,000 for the loss of income from franchise sales which Nabcor claimed it would have made but for the alleged conspiracy. (E1444) But there was no evidence that Nabcor lost so much as a single franchise sale as a result of any actions of the defendants, and Nabcor conceded that below. (A3903) Moreover, there was absolutely no evidence as to the number of franchises Nabcor could have sold "in the best of all possible worlds." Its damage figure rested solely on an unsupported assumption that Nabcor would have sold 2,200 franchises per year—rather than the total of 145 it in fact sold from 1966 through 1970. (A3900-02)

2. A second claimed element of damages was \$4,000,000 of royalties which Nabcor claims it would have received on automobile sales which it claimed its existing brokers would have made but for the alleged conspiracy. (E1444)

This projection is fictitious.⁷³ First, as the trial court concluded, there was no evidence that the defendants im-

73. This claimed element of damages is also unrecoverable as a matter of law. Franchisors such as Nabcor lack standing to recover royalties and similar payments which they would have received but for the consequences of alleged antitrust violations which interfere with their franchisees. *Long Island Lighting Co. v. Standard Oil Co. of California*, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 382 F.2d 925 (10th Cir. 1967).

paired the ability of Nabcor's brokers to obtain automobile orders. (A6344, TRADE CAS. at 70,513) Hence, there was no basis for concluding that the Nabcor brokers would have ordered even a single additional car but for the alleged conspiracy. Second, Nabcor's projection is based on the unsupported assumption that each of its brokers would have ordered 100 cars per year. (A3880-82) This projection is inconsistent with the performance of the brokers. (A6344, TRADE CAS. at 70,513; E1397) And there is no evidence from which any figure—other than their actual performance—could rationally be derived.

3. A third claimed element of damages was \$20,000,000 for royalties on car sales which allegedly would have been made by people who would have bought Nabcor franchises but for the alleged conspiracy. (E1444) This claim simply combines the defects of the two preceding claims. There was no proof that Nabcor would have sold more franchises and no proof of how much business these hypothetical franchisees would have done.⁷⁴

4. A fourth claimed element of damages is \$178,920, the alleged lost profit on automobiles Nabcor claims it would have sold directly to the public, bypassing its franchisees, but for the alleged conspiracy. (E1444) The claim is simply nonsense. Frank Maiorana testified that Nabcor did not normally make direct sales in the regular course of business. (A3584) There were only six direct sales in Nabcor's entire existence. (A3904)

The remaining elements of Nabcor's damage claim are even more far-fetched than these, and they are dealt with in the margin.⁷⁵

74. See also *supra*, note 73.

75. Nabcor can hardly recover a capital contribution made to it by Frank Maiorana (E1444), particularly as it was a going and profitable concern at the end of the damage period. (DX F-6, at E1296; *supra*, p. 56) Its claim to recover \$485,538 in income actually received from franchise sales (E1444) is irrational: the sum was income to Nabcor, not damage. It cannot recover the loss of

(footnote continued on next page)

The baseless nature of Nabcor's damage claims and theories is an independent basis for sustaining the direct verdict below.

In *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962), this Court affirmed a directed verdict for the defendant in an antitrust treble damage action on the ground that the plaintiff failed to adduce evidence permitting the jury to make any rational determination of damages. It did so notwithstanding its view that the defendant was guilty of the antitrust violation charged. Judge Friendly, writing for the Court, said:

"The jury may not render a verdict based upon speculation or guesswork."

* * *

"[E]vidence that defendant had unlawfully placed obstacles in the way of competition generally, and that these continued in some measure during the damage period, would not meet plaintiff's burden of proving 'damages in some amount susceptible of expression in figures.' " 297 F.2d at 910.

Here Nabcor repeatedly came forward with one damage theory more irresponsible than its last. In the midst

the \$240,000 proceeds of its public offering. (E1444) Not only was there no evidence of any such loss, but the public offering did not even occur until April 1971 (E1273), and the claim therefore is outside the damage period. Nabcor's claim to be indemnified against a judgment allegedly recovered against it more than two years after the close of the damage period (E1444) suffers from precisely the same defects. Finally, it is not entitled to be indemnified against totally speculative contingent liabilities (E1446) as to which there was no proof whatsoever.

76. *Accord, e.g., Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351-53 (3d Cir. 1975); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 698-99 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440, 444 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

of the trial, Judge Griesa went to considerable lengths to instruct plaintiffs' counsel on how to prove a damage case. (A3262-64, A3753, A4033-36, A4327-36, A5462-65) He insisted that Nabcor stop wasting the court's time with outlandish claims and directed that it itemize and support a responsible claim. (A3735, A3753) The product—court exhibit A (E1444-47)—is completely unsupported by evidence, as we have demonstrated. Accordingly, even if there was a conspiracy which caused some injury to Nabcor, Nabcor did not, in Judge Friendly's words, sustain its "burden of proving 'damages in some amount susceptible of expression in figures.' " *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, *supra*, 297 F.2d at 910.

The responsibility for that failure rests squarely on Nabcor's shoulders: Nabcor never was willing to abandon the idea that this lawsuit was just a successor to the Maioranas' original get-rich-quick scheme. The judgment therefore should be affirmed.

V

**General Auto Sales Did Not Make Out a
Prima Facie Case as to Liability or Damages**

General Auto Sales & Leasing Corp. ("General") was a Nabcor master broker in Buffalo, New York, operated by Dale Strimple and, briefly, by Donald Bolling. It was in business from October 1967 until July 1970. (A4875; A4823-24) It was unusual in that it was one of only two Nabcor brokers which obtained new cars directly from dealers as well as by ordering them from Nabcor. (See E796-808; E109-11)

It is undisputed that General had no difficulty whatsoever in buying new automobiles at any time after February 1, 1968. (A4875; A4872) It bought at least 33 new cars from GM dealers in Buffalo after that date.⁷⁷ (E796-97) Thus, the principal issue as to General was whether there had been a conspiracy in Buffalo to boycott General during the period from approximately the end of September 1967 until around the end of January 1968. (A6382-85, TRADE CAS. at 70,523-24)

The evidence below, viewed in the light most favorable to General, would not have permitted the jury to find that GM participated in a conspiracy in the Buffalo area in late 1967. There was no competent evidence that GM took any action to discourage dealers from selling to General. Equally important, there was no evidence that General was injured by any actions of defendants in late 1967 and no rational basis on which the jury could have awarded any damages. Each of these alternative grounds requires affirmation.

77. General had virtually no records of its automobile orders and purchases. The records allegedly were stolen, though it was undisputed that the records had no intrinsic value and disappeared while Strimple was the subject of a tax investigation. (A4588-90) The list of purchases cited in the text was reconstructed chiefly from dealer records and is incomplete. (Compare E796-97 with A5216-17 and Tr 2975-76)

**A. There Was No Evidence that GM Participated
in Any Conspiracy in Buffalo**

Strimple originally became a Nabcor broker in July 1967, though he made no effort to start his business until some time after September 21, 1967. (A4823-26; A4704) At about that time, he met Bolling, another Nabcor broker in Buffalo. (A4705) Lured by Frank Maiorana's claim that a first year profit of \$900,000 to \$1,000,000 could be had on a modest investment (A4836-38; A4583), Strimple and Bolling decided to combine their operations and buy a "master broker" franchise. (A4470) This they did on October 6, 1967, under the General name. (E842; A4470)

The master broker franchise gave General the right to sell franchises. (A4583; E843 ¶¶ 4, 7) It was anticipated that General, as a master broker, would buy cars from dealers in Buffalo to supply any brokers whom it franchised (A4583-84; A4712-14), although it also was entitled to order cars from Nabcor (A4584; E842 ¶3A).

Around October 6, 1967, Strimple and Bolling began to approach Buffalo area dealers in an effort to find sources of new cars to supply to brokers they eventually hoped to franchise. They asked dealers for commitments to sell General 200 or more cars over the course of the model year at prices from \$25 to \$50 over the dealers' cost, a price far below retail. (A4540; A4602-04; A4722; A4883-88; A4891-94)

Strimple knew that dealers would not be inclined to sell to General if they knew that General would be reselling cars in competition with them. Accordingly, the fact that General intended to resell the cars was concealed in these approaches, and the dealers were told that the cars were to be shipped "all over." (A4846-50) And the use of the term "leasing" in General's name was deceptive, as General did not lease cars. (A4604-05)

The dealers' reactions to the 200 car proposal varied. Several said at the outset that they were not interested. (E.g., A4545-46; A4788) Two or three initially expressed

interest, but later backed off. (*E.g.*, A4545; A4816; A4768-71) One agreed to sell at \$125 over cost, but raised his price to \$250 a few days later. (A4790-91; A4890)

General's discussions with dealers about its 200 car proposal were quite hypothetical in that the need for 200 or more cars was merely a projection of possible requirements over the coming year. At the time these discussions took place, General in fact had only 5 to 7 orders for cars from its customers. (A4607) There is no evidence that General asked any of the Buffalo dealers to supply those cars, other than perhaps mentioning to one dealer, Laks Chevrolet, that it would be placing some specific orders shortly if the dealer was interested in the 200 car proposal.⁷⁸ (A4543-45; A4768-72) And whatever the dealers' responses were to the 200 car proposal, each of the Buffalo dealers whom General asked to supply specific cars for specific orders invariably did so. (Bain—A4749-50, A4816, E796-97, E1392-93; Batt—E796-97; Gillogly—E796-97, E187-204; Laks—A4816) (A6384, TRADE CAS. at 70,523)

General's conspiracy claim against GM depends entirely on two elements: (1) a bulletin published by the Buffalo Automobile Dealers Association ("BADA bulletin") on September 29, 1967, and (2) the alleged reactions of the Buffalo dealer defendants⁷⁹ and certain other dealers⁸⁰ to

78. The orders were placed with Kem Dengler Chevrolet-Oldsmobile in Westfield, New York, which first accepted and then rejected them. Westfield is 65 miles from Buffalo. *See infra*, note 86.

79. The Buffalo dealer defendants are: Gillogly Chevrolet, Inc., f/k/a Hamister-Gillogly Chevrolet, Inc. and Clements-Gillogly, Inc.; Bob Bain Chevrolet; Glen Campbell Chevrolet; and Paul Batt Buick, Inc.

80. While plaintiffs' brief refers to alleged incidents involving a large number of Buffalo car dealers (pl. br. 32-33), the trial court ruled that General was limited to the defendants and alleged co-conspirators identified by General in response to interrogatories. (A4761-66) General does not contest that ruling here, and we therefore do not deal with plaintiffs' references to Keller Chevrolet, Brown Motor Sales, Tinney Cadillac, Holiday Oldsmobile, Keyser Pontiac-Cadillac, and Dengler Chevrolet of Fredonia, New York.

General's 200 car proposal. But there was simply no evidence connecting GM to either.

The BADA bulletin described Nabcor in unfavorable terms and expressed the view that no dealer would want to get involved in such a scheme. (A6383, TRADE CAS. at 70,523) There was no evidence, however, that GM had anything to do with the preparation or distribution of the bulletin. Hence, the BADA bulletin would be evidence against GM only if it somehow tied GM into a conspiracy among the dealers to whom the bulletin was distributed, and it was received in evidence subject to that limitation. (Tr 393-94) There was simply no such evidence below.⁸¹ The BADA bulletin therefore is entirely irrelevant to General's claim against GM.

Turning then to the dealers' alleged responses to General's proposal to buy 200 cars, there is again a complete absence of competent evidence that GM had anything to do with any of their various reactions. While there was testimony by plaintiffs that Robert English, a Chevrolet employee, threatened Bolling in the presence of Gillogly Chevrolet personnel and that Bob Bain Chevrolet told them that Chevrolet had told him not to sell to General (pl. br. 32-34), this testimony was excluded as to GM.⁸² Hence,

81. The evidence did show that Mr. Womack, the zone manager of Chevrolet's Buffalo zone office, had a copy of the newsletter and distributed copies to his district managers. (E57; E38-41) When GM's fleet section learned of this, it told Womack that he should not have done so because the employees might "not apply the information or interpret it in accordance with [GM policies]." (E57) Womack responded that his employees had "not mis-applied the information" but nevertheless undertook to discuss the subject with them again. (E57) There is no evidence whatsoever that any GM employees took any action with respect to the newsletter. The trial court carefully considered this point below. (A6013-17)

82. The alleged Bain statements were excluded as to GM pursuant to the court's ruling on the co-conspirator hearsay issue (A4744; A4727-28; A2960-61), which is not contested here.

The alleged English statements were excluded as to GM on the ground that plaintiffs failed to lay the foundation required by FED. R. Ev. 801(d)(2). Plaintiffs do not contest the trial court's ruling on this point. Nevertheless, the issue was briefed and argued below on the basis of a full evidentiary record as to the nature of English's

(footnote continued on next page)

even if there were evidence from which the jury might have found that any of the dealers in Buffalo boycotted General, there was no basis for finding that GM participated.

But we need not rest on this ground alone. The evidence could not have supported a finding that the Buffalo dealers engaged in a concerted refusal to deal with General.

There was no evidence below that any of the Buffalo dealers communicated among themselves about General. Hence, General's theory, though never articulated, must be that there were parallel responses to its 200 car proposal by the dealers who received the BADA bulletin and that this was enough to get to the jury.

This theory encounters several problems.

To begin, the dealers' responses were not parallel and, more important, were fully consistent with their self-interest and explicable in a number of other ways.

As we have noted, all of the dealers relevant here were approached with General's 200 car, \$25 to \$50 over cost proposal. Dave Hallman Chevrolet agreed to sell, first at \$125 over cost and then at \$250 over cost—still well below retail prices. Strimple just did not want to pay that price. (A4790-91; A4890) Stevens Buick immediately told Strimple that it did not want to do business with brokers. (A4853-56; A4786) Bob Bain Chevrolet initially expressed interest in the proposal, although it voiced concern about Strimple's ability to pay for the cars. (A4744-45) Strimple and Maiorana offered to pay Bain via Nabcor drafts (A4840-41), but there was no competent evidence against GM as to Bain's ultimate response to the 200 car proposal. In any event, General concedes that in 1968 it began ordering specific cars from Bain and received all without difficulty. (A4749-50; A4816; A4875; A4872; E796-

responsibilities and the scope of his authority and employment with Chevrolet. The brief is document 877 in the record on appeal in this Court. The argument on this point appears at Tr 2165-2201. The Court's ruling appears both at the end of the argument (Tr 2197-2201) and in its opinion (A6384, TRADE CAS. at 70,523).

97; E1392-93) Batt Buick ordered a car for General in December 1967, reordered it when the car was recalled due to a mechanical defect, delivered the reordered car, and never refused to sell to General. (A4751-55; A4482-88; A4889; E796-97) Glen Campbell Chevrolet simply told Strimple that it was not interested in his proposal. (A4788-89) Laks Chevrolet initially expressed interest in the 200 car proposal, then declined, but eventually sold to General. (A4545; A4816; A4768-71) And Gillogly Chevrolet did not respond to the proposal,⁸³ but by early 1968 became General's largest supplier of cars. (E796-97; E187-204) Indeed, it even secured fleet allowances for General from Chevrolet which were approved by Chevrolet's Buffalo zone office. (A4909-11; E853, 858-59) Thus, the Buffalo dealers did not uniformly turn down General's proposal. They responded to General in virtually every possible fashion.

Not only was there a striking diversity of reaction to General, but any reluctance to deal with General could have been attributable to many circumstances other than a concerted refusal to deal. The prices General wanted to pay were very low. (A4602-04) Plaintiffs admitted that dealers—if they learned that General was a reseller—could well conclude that selling to General was against their respective interests because to do so would set up General as a competitor. (A4846-50) Like Bain, dealers may have been concerned about General's financial responsibility.

It is well-established that even parallel refusals to deal are not alone sufficient to take a case to the jury or to

83. Bolling's testimony was that Mr. English of Chevrolet came in while Bolling was making his presentation to Gillogly Chevrolet and that Gillogly did not respond to the proposal. (A4540-43) General did not ask Gillogly to supply the specific orders it had at the time. (A4543-44) In addition, Strimple testified to at least 4 or 5 different versions of an alleged conversation with a Gillogly Chevrolet salesman. (See A6031-35) But the details need not concern the Court because none of the salesman's alleged statements—innocuous though they were on several versions—was received against GM. (A4727-28)

withstand summary judgment in a conspiracy case,⁸⁴ at least where the defendants did not act in contradiction of their own economic interests.⁸⁵ Here the actions of the Buffalo dealers were not even parallel, but included several different reactions: lack of any interest, willingness to sell, and initial interest followed by disinterest. Their responses to General, moreover, were fully consistent with their own self-interest. Hence, there is no basis for an inference of concerted action.

The second problem with General's parallelism theory is its inconsistency with the fact that all of the dealers which received the BADA bulletin nevertheless filled every specific order General placed.⁸⁶ Even Strimple admitted that no dealer refused to deal with General after February 1, 1968. While General tried to explain these facts away as a change of heart induced by a threatened investigation or, alternatively, by claiming that it obtained the cars via a subterfuge, neither explanation was even colorable. The

84. *E.g.*, *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1047 (2d Cir.), *cert. denied*, 429 U.S. 883 (1976); *Modern Home Institute, Inc. v. Hartford Acc. & Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975); *Kreager v. General Electric Co.*, 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); *Raitport v. Chase Manhattan Capital Corp.*, 388 F. Supp. 1095 (S.D.N.Y. 1975); *Raitport v. General Electric Co.*, 1974-2 TRADE CAS. ¶75,313 (S.D. N.Y. 1974).

85. This and other courts frequently have recognized that lack of truly parallel action and the consistency of the defendants' actions with legitimate self-interest are important factors negating any inference of conspiracy. *E.g.*, *Michelman*, *supra*, 534 F.2d at 1043, 1047; *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975); *Hopkins Corp. v. Studebaker Corp.*, Onan Division, 355 F. Supp. 816, 828-29 (E.D. Mich. 1972), *aff'd*, 496 F.2d 969 (6th Cir. 1974); *Independent Iron Works v. United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Calif. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *United Shoppers Exclusive v. Broadway-Hale Stores, Inc.*, 1966 TRADE CAS. ¶71,727, at 82,292 (N.D. Calif. 1965).

86. The dealer which originally accepted General's orders and then returned them, Kem Dengler, was located in Westfield, New York, 65 miles from Buffalo, did not receive the BADA bulletin, and did not belong to the BADA. There is no evidence that he communicated with anyone about whether to handle the General business. (A4601; A4933; E320-24)

investigation did not begin until after March 1969 (A4873-74; A6041), and General admits that there were no refusals to deal after February 1, 1968. (A4875; A4872) The subterfuge contention was simply nonsense because the dealers knew that General was buying the cars which Strimple suggests they thought were destined for Econo-car, a well known leasing company.⁸⁷ (A6041-42; A4819-22; A4910-11)

B. In Any Event, There Was No Evidence that General Was Injured by Actions of Any of the Defendants

As the trial court concluded, the most important point about the Buffalo situation is that, whatever happened, General was not injured. (A6384, TRADE CAS. at 70,523-24)

During the period from roughly October 6, 1967, when General became a "master broker," and the end of the year, General was asking dealers about supplying large numbers of cars over a period of a year. As the trial court noted, however:

"[E]xcept for a trivial number of orders which the representatives of General were carrying around to offer as bait to the dealers, General was not seeking to place actual orders for cars at this time

"To the extent that General actually came back to any of these dealers with actual orders for cars, these orders were filled." (A6384, TRADE CAS. at 70,523)

And General concededly got all the cars it wanted beginning in early 1968. (A4875)

As we have shown, a private antitrust plaintiff like General must establish not only a violation of the antitrust laws, but that he was in fact injured as a proximate result of the violation.⁸⁸ This General failed to do. There was no evidence from which the jury could have concluded that General was injured by any actions of the defendants, even

87. Indeed, Chevrolet's Buffalo zone office approved payment of fleet allowance on cars Gillogly Chevrolet sold to General. (E853, E858-59) Chevrolet therefore knew that Gillogly was selling to General, not Econo-car.

88. *Supra*, note 29.

if there were a boycott against General in the last months of 1967.

Since General got all the cars it wanted except perhaps the "trivial number" referred to by Judge Griesa, the history of those orders must be summarized.

The orders in question antedate General's existence by months. In mid-July 1967, Bolling—later a partner in General—bought a Nabcor "broker" franchise by himself. (E618-22; A4463) He immediately began seeking car orders from customers and received 7 to 10 in his first month. (A4463; A4466-67) As a "broker," Bolling was obligated to order his cars from Nabcor, and he did not try to buy from dealers in Buffalo or elsewhere. (E619 ¶17; A4568) But Bolling did not send those orders to Nabcor immediately. He held onto them until General was formed in October—three months later—and then took them into General.⁸⁹ (A4568-71; A4472-74)

Even after General was formed and Strimple and Bolling began making the rounds of some of the local dealers with their 200 car proposal, there was no evidence that they asked any of the Buffalo dealers to sell cars to them for these orders. The evidence was to the contrary. (A4543-44; A4545)

In early November 1967, about four months after Bolling obtained the orders, General sent them to Nabcor. Of the seven sent to Nabcor, three were delivered, one was not, and General or its customers cancelled three. (DX F-7, E1370; A4570; A4571-81) There was no evidence as to why Nabcor failed to deliver the one car. Indeed, there is no evidence that it even tried to order it from a dealer.⁹⁰ And while one or two of the three customer cancellations

89. Bolling testified that he received 18 to 20 other orders, but that he never tried to fill those orders either from Nabcor or local dealers. (A4472-76)

90. Nabcor's order log, PX 450, reflects receipt of the order from Bolling but contains no record of any order being placed with a dealer. (E107-08, line 26) Moreover, this order was for a Cadillac. None of the Buffalo dealer defendants or alleged co-conspirators was a Cadillac dealer.

were attributed to delay, the delay was not the defendants' fault. The plain fact was that Bolling held those orders for several months before making any effort to fill them.

On this record, the jury could not reasonably have concluded that General's failure to fill four of these seven orders was the proximate consequence of any boycott in Buffalo in late 1967.⁹¹ Since injury, proximately caused, is an element of a cause of action under the antitrust laws, General failed to make out a prima facie case.⁹²

C. There Was No Basis for Any Damage Award

Even if there were a boycott in Buffalo in late 1967, the only conceivable injury suffered by General was the alleged loss of four of the seven orders it inherited from Bolling and eventually sent to Nabcor.

General made no serious effort to prove a damage case. Hence, it is not surprising that there was no evidence from which the jury could have awarded damages for these four lost sales on the basis of anything other than speculation. There was no evidence as to how much profit, if any, General would have made on those four orders or how much, if anything, it generally made on new car sales. Without that basic information, the jury simply would have been asked to guess.

While great latitude is permitted in computing damages in antitrust cases, pure guess-work is not. *Supra*, Point IV. Accordingly, even if there were a conspiracy in Buffalo from October 1967 through January 1968, and even if that conspiracy resulted in General losing these four sales, the judgment below nevertheless must be affirmed because there is no basis for assessing damages on such a claim in this record.

91. There was evidence below to the effect that General made unsuccessful efforts to sell franchises in late 1967 and January 1968. There was no evidence from which a jury could have concluded that General's failure was caused by the defendants. Indeed, the only relevant evidence was that Strimple told prospective franchisees that there were no problems in obtaining automobiles. (A4802-05; A4846) Thus, General's franchise sales efforts could not have been affected even if there were automobile supply problems.

92. *Supra*, notes 29-30.

VI

The Remaining Plaintiffs Failed to Make Out a Prima Facie Case as to Liability or Damages

A. The Claims of the Individual Plaintiffs

Frank and Anthony Maiorana of Nabcor and Dale Strimple of General sued individually here. The Maioranas sought recovery on the theory that they were "obliged to work an extraordinary number of hours per week" and that Nabcor was unable to compensate them adequately for their efforts. (A99) The complaint was silent as to the basis of Strimple's claim.

There was no evidence below as to any of these individual claims. In any event, employees, officers and shareholders of corporations lack standing to sue under the anti-trust laws for alleged injuries such as these.⁹³ (A6395, TRADE CAS. at 70,526)

B. The Claims of the Other Brokers

1. *Jamele*. The late Louis Jamele (represented here by his administrator, Ralph Ajello) was a Nabcor broker in Connecticut. Plaintiffs concede that none of the defendants did anything that injured Jamele directly. (A5696-97) Jamele's claim is only that he did not get support services from Nabcor to which he allegedly was entitled. (A5697)

The only evidence offered in support of the Jamele claim was a two-page summary of his deposition which did not even refer to any failure by Nabcor to support his operations. (A5697-99) In any event, an indirect injury

93. *E.g.*, Long Island Lighting Co. v. Standard Oil Co. of California, 521 F.2d 1269, 1274 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); Hans Hansen Welding Co. v. American Ship Building Co., 1973-2 TRADE CAS. ¶74,739 (S.D.N.Y. 1973).

such as that alleged is not compensable under the anti-trust laws.⁹⁴

2. *Young*. Alfred J. Young was a Nabcor broker in Watertown, New York. His claim—which evidently is based on the same theory as Jamele's—was supported only by his own testimony, which appears almost in its entirety at A5206-27. Young testified that he got into a lawsuit with a customer, evidently over whether the customer had agreed to take a 1970 model car when his order for a 1969 model could not be filled because production of 1969 models had ended. (A5207-08; A5217-19) Young said he requested assistance from Nabcor in connection with the lawsuit and that it was not forthcoming. (A5208-10) There was no evidence as to what assistance was sought or why it was not forthcoming. In any event, the lawsuit was settled. (A5210)

Young's claim is unsupported by evidence and, for the same reason as Jamele's, legally insufficient.⁹⁵

3. *Nabcor of East New York, Inc.* Nabcor of East New York, Inc., a/k/a Turco Auto Sales & Leasing ("Nabcor East") was a Nabcor brokerage in Yonkers operated by Ernest Turco. In addition to running Nabcor East, Turco performed numerous services for Nabcor such as keeping motor vehicle department records and ordering and picking up cars purchased by Nabcor from New York-area dealers. (*E.g.*, A5061; A5109)

The only evidence offered in support of the Nabcor East claim was Turco's testimony. But apart from describing his investment in Nabcor East and his efforts to

94. *See, e.g.*, Long Island Lighting Co. v. Standard Oil Co. of California, *supra*, 521 F.2d at 1274; Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

95. With the exception of the 1969 model involved in the lawsuit and possibly one other car, Young got all the cars he ever ordered. (A5216-19; E1387, A5219-20)

sell franchises, Turco's testimony related almost exclusively to Nabcor's claim.⁹⁶ (Tr 2781-2870, A5059-5123) There was no evidence that Nabcor East sustained any injury by virtue of any alleged actions of any of the defendants.

* * *

In view of the total failure of proof below, as well as the legal insufficiency of their claims, the judgment dismissing the complaint as to Nabcor East, Jamele, Young, Strimple, and the Maiorana brothers should be affirmed.

96. Turco did testify that two Westchester Chevrolet dealers—not defendants here—told him they would not sell to Nabcor East. (A5085-87) There was no evidence, however, that this caused any difficulty for Nabcor East or that GM was responsible for these alleged refusals. Indeed, the evidence showed that Turco had substantially no difficulty in obtaining cars, including Chevrolets. (*E.g.*, E1378-86; A5098; A5095)

VII

Plaintiffs Had a Fair Trial Before an Impartial Judge

Although this case already has consumed a staggering number of hours in a congested district court, plaintiffs ask this Court to order a new trial, irrespective of whether they made out a prima facie case below. They complain that the trial judge erred in declining to disqualify himself on plaintiffs' oral motion, made four years after the judge was assigned to the case and nine weeks after the evidentiary hearing and trial began. They suggest, without explicitly saying so, that they were denied a fair trial.

The record in this case proves otherwise. It shows conclusively that plaintiffs were heard at great length by a judge who, if anything, was overly tolerant. They were heard despite abundant evidence of perjury and other misconduct by plaintiffs. The charge of bias and the eleventh-hour recusal motion, we suggest, were belatedly injected below in a cynical, last-ditch effort to save a hopeless cause.

We will show here that the stated basis for plaintiffs' recusal motion was frivolous and that any irritation or impatience evidenced by the trial judge was a temperate response to serious provocation by plaintiffs and their counsel. We will show, moreover, that the judge went far out of his way to assist plaintiffs in presenting their case and that plaintiffs therefore had more than a fair trial.

A. Davis Polk & Wardwell's Prior Representation of GM Did Not Require the Judge to Recuse Himself

The stated ground for plaintiffs' oral recusal motion⁹⁷ was that the judge had been a member of Davis Polk &

97. Plaintiffs purportedly moved under 28 U.S.C. §144. They did not, however, comply with the procedural requirements of the statute, which provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge

(footnote continued on next page)

Wardwell before his appointment to the bench and that Davis Polk had represented GM prior to the judge's appointment. There was no suggestion that either Judge Griesa or Davis Polk had ever represented GM in this or any related matter. (A5335)

Judge Griesa denied the motion, stating:

"[The Court:] . . . The Davis Polk law firm did some work for General Motors or General Motors directors or entities connected with General Motors at times.

"I personally at one point worked on an opinion letter on some problem in which General Motors was the client *and it had nothing remotely to do with this litigation*. I don't even recall when that was.

"But under no circumstances was I ever involved with the representation of General Motors in any way or to any extent which would possibly prejudice me or involve any possible conflicts of interest. There is simply no substance to that." (A5335-36) (emphasis added)

It has been established for nearly a century that a judge's prior representation of a litigant appearing before him does not require the judge to disqualify himself, at least where the judge did not previously represent the party

before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Their oral application therefore was a nullity. *See, e.g., Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *cf. Wolfson v. Palmieri*, 394 F.2d 7 (2d Cir. 1968).

in an action related to the matter at issue.⁹⁸ Indeed, Congress enacted the rule in its 1974 amendment of 28 U.S.C. §455.⁹⁹ That statute—designed to broaden the grounds for disqualification—provides in pertinent part that a judge must disqualify himself only:

"Where in private practice he served as a lawyer *in the matter in controversy*, or a lawyer with whom he previously practiced law served during such association as a lawyer *concerning the matter . . .*" 28 U.S.C. §455(b)(2) (Supp. V, 1976) (emphasis supplied)

Thus, neither Davis Polk's prior representation of GM nor Judge Griesa's one personal involvement in that representation constitutes grounds for disqualification.¹⁰⁰

We note also that plaintiffs waived their disqualification claim below by failing to assert it promptly. A close

98. *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., in chambers); *Carr v. Fife*, 156 U.S. 494, 498 (1895); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906-07 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959); *Simmons v. United States*, 89 F.2d 591 (5th Cir.), *cert. denied*, 302 U.S. 700 (1937). *See also* *United States v. Seiffert*, 501 F.2d 974, 977-78 (5th Cir. 1974); *Weiss v. Hunna*, 312 F.2d 711, 714 (2d Cir.), *cert. denied*, 374 U.S. 853 (1963).

99. 28 U.S.C. §455 applies only to actions initiated on or after December 5, 1974, and therefore does not apply to this case. Act of Dec. 5, 1974, Pub.L. 93-512, §3, 88 Stat. 1610; *United States v. Haldeman*, 559 F.2d 31, 130 n.284 (D.C. Cir. 1976), *cert. denied*, 97 S. Ct. 2641 (1977). Its predecessor, Act of June 25, 1948, ch. 646, 62 Stat. 908, *amended*, Act of Dec. 5, 1974, Pub. L. 93-512, §1, 88 Stat. 1609, required disqualification only where the judge was "so . . . connected with any party . . . as to render it improper, *in his opinion*, for him to sit. . . ." (emphasis supplied) Hence, the predecessor statute would not have required disqualification either. *See, e.g., United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 97 S. Ct. 2641 (1977); *Weiss v. Hunna*, *supra*, 312 F.2d at 714 (Friendly, J.).

100. Plaintiffs' suggestion that the mere filing of a motion under 28 U.S.C. §144 required the judge to remove himself (pl. br. 70) is simply wrong. The judge must remove himself only if the motion states facts which, if true, demonstrate that the judge "has a personal bias or prejudice" for or against a party. *Berger v. United States*, 255 U.S. 22 (1921); *United States v. Haldeman*, *supra*, 559 F.2d at 131; *Rosen v. Sugarman*, 357 F.2d 794, 797-98 (2d Cir. 1966).

reading of plaintiffs' papers shows that plaintiffs' counsel knew months prior to the trial of this action that Davis Polk had represented GM¹⁰¹ (A5601, ¶¶3, 5), and he does not deny having known that Judge Griesa had been a member of that firm.¹⁰² Nevertheless, plaintiffs did not make their insufficient oral motion until November 23, 1976, and did not file their motion to disqualify the judge until November 29, 1976—the day on which the plaintiffs rested. (A44, A5717) This delay constitutes a waiver of any disqualification.¹⁰³

**B. Judge Griesa's Rulings in this Case
Are Not a Basis for Disqualification**

Some days after plaintiffs' oral disqualification motion was denied, they filed an affidavit of prejudice and a certificate of counsel (A5600-05) in an apparent effort to satisfy retroactively the procedural requirements of 28 U.S.C. §144.¹⁰⁴ They there asserted for the first time that various rulings made before and during the trial evidenced Judge Griesa's alleged bias. (*Ibid.*) They seem to press the point here, as their brief contains a *potpourri* of distorted characterizations of a number of rulings below. (Pl. br. 65-66)

Curiously, plaintiffs do not assert that any of the rulings which they claim evidenced bias was erroneous. They could hardly do so, for when one looks at the record rather

101. Indeed, defendants made available for inspection, in response to plaintiffs' interrogatories, documents which showed that Davis Polk was counsel to GMAC's salary and bonus committee. Plaintiffs' counsel evidently did not bother to review them, which doubtless accounts for his baseless charge that we endeavored to mislead the trial court on this point. (*See* pl. br. 60-61)

102. The fact was well publicized at the time of Judge Griesa's appointment. *E.g.*, N.Y. Law Journal, June 16, 1972, at 1, col. 6; N.Y. Times, June 16, 1972, at 80, col. 1-8.

103. *See* 28 U.S.C. §144; *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 925 (1977); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Laughlin v. United States*, 344 F.2d 187 (D.C. Cir. 1965); *Faubus v. United States*, 254 F.2d 797 (8th Cir.), *cert. denied*, 358 U.S. 829 (1958).

104. *See, e.g.*, *Galella v. Onassis*, *supra*, 487 F.2d at 997.

than the distortions and outright falsehoods in plaintiffs' brief, one finds that the rulings in question—to the extent they occurred at all—were abundantly fair and correct.¹⁰⁵

But this Court need not concern itself with whether the rulings to which plaintiffs point were correct *vel non*. Even if Judge Griesa did err in his attempts to control this litigation, such errors cannot be the basis for disqualification.

The Supreme Court has expressly held that rulings against a party, whether right or wrong, are not a basis for disqualification of the judge. In *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913), the Court said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show *not merely adverse rulings already made*, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice."¹⁰⁶ (Emphasis supplied)

Any other rule would wreak havoc on the federal courts. Disappointed litigants would routinely seek to disqualify judges simply because they disagreed with their rulings.¹⁰⁷

Hence, Judge Griesa's rulings below are not a basis for disqualification and do not evidence any bias.

105. The attached Annex sets out the facts.

106. *Accord, e.g.*, *United States v. Haldeman*, *supra*, 559 F.2d at 133; *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425 (10th Cir. 1966), *cert. denied*, 386 U.S. 977 (1967); *United States v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970); *Palmer v. United States*, 249 F.2d 8, 9 (10th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *Littleton v. De Lashmuth*, 188 F.2d 973, 975 (4th Cir.), *cert. denied*, 342 U.S. 897 (1951); *Lazofsky v. Sommerset Bus Co.*, 389 F. Supp. 1041, 1044 (E.D.N.Y. 1975).

107. *United States v. Haldeman*, *supra*, 559 F.2d at 132 n.297, quoting *Lazofsky v. Sommerset Bus Co.*, *supra*, 389 F. Supp. at 1044.

C. The Statements of which Plaintiffs Complain Reflect Evidence Adduced in Open Court, Not an Extrajudicial Prejudice. They Are Not a Ground for Recusal

Plaintiffs complain of a number of comments by Judge Griesa, outside the presence of the jury, on the merits of plaintiffs' case, the veracity of plaintiffs' witnesses and, in isolated instances, on the preparation and trustworthiness of plaintiffs' counsel. While we submit that the judge's comments were temperate responses to serious provocation, that is beside the point.

A judge must disqualify himself only if he has "a personal bias or prejudice. . . ." 28 U.S.C. §144. As the Supreme Court has held:

"The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

Hence, comments on the proceedings before the judge do not warrant disqualification.

This Court has applied this principle consistently. It invariably has rejected attempts to require disqualification on the basis of a trial judge's comments on the proceedings before him.

United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976), *cert. denied*, 429 U.S. 998 (1977), is illustrative. There the Court affirmed denial of a motion to recuse based upon statements made by the trial judge in open court, stating:

"Each of the comments made by the judge was in the course of a judicial proceeding in the context of discussions with the defendants before him. None of them appears to have arisen from an extrajudicial source or 'resulted in the formulation of an opinion on the merits not based upon what the judge has learned by his participation in the proceedings. . . .' The rule of

law, without belaboring the point, is that what a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." 533 F.2d at 785.

Other cases applying the same rule are legion.¹⁰⁸

Here, Judge Griesa's comments plainly arose from the record in this case. Indeed, the record shows that they were more than justified by a steady stream of false and inconsistent testimony by the plaintiffs, discussion of which could fill this brief. In view of the limitations of time and space, we cite only a few examples.

1. *Anthony Maiorana—Rohrer Chevrolet*. During the pretrial hearing on the admissibility of co-conspirator hearsay, Anthony Maiorana of Nabcor testified that a GM employee visited Nabcor's office in December 1967 and told Maiorana that he would "see to it" that Rohrer Chevrolet stopped selling cars to Nabcor. (R881, Oct. 7, 1976, at 308-12; *see also* A4155-61) Maiorana went on to testify that Rohrer Chevrolet "stopped the Chevrolets, then that is it. They shut it off in January of 1968." (*Id.* at 312)

On cross-examination, it developed that Rohrer Chevrolet did not "stop the Chevrolets" or "shut off" Nabcor in January 1968. Nabcor's own records proved that Rohrer continued to sell to Nabcor until at least July 1970, selling it over 80 cars in the intervening period. (R881, Oct. 7, 1976, at 333-36; DX J, E802-08; DX D-7, E1357-68) More-

108. *E.g.*, *United States v. Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977); *United States v. Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973); *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 30 (2d Cir. 1972); *Wolfson v. Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Mirra v. United States*, 379 F.2d 782, 787-88 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967). *Accord*, *Grinnell Corp.*, *supra*, 384 U.S. at 583; *United States v. Haldeman*, *supra*, 559 F.2d at 133; *Pfizer Inc. v. Lord*, 456 F.2d 532, 538-39 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972); *In re Union Leader Corp.*, 292 F.2d 381, 388-89 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961).

over, the alleged threat by the GM employee was inconsistent with Maiorana's account of the same meeting given in his deposition, in which neither the alleged threat nor Rohrer Chevrolet was even mentioned. (R881, Oct. 7, 1976, at 337-40) Hence, his direct testimony was markedly inconsistent with the facts and surely enough to warrant judicial concern and comment.

2. *Donald Bolling and the Buffalo Orders.* A key focus of the trial testimony regarding the events in Buffalo was whether General ever failed to get a car by virtue of any refusal to deal.

Donald Bolling of General testified on direct that he sent a total of seven orders to Nabcor and that Nabcor was unable to fill any of them. (A4478) On cross-examination, however, after being confronted with Nabcor's records, Bolling admitted that Nabcor delivered three of the seven cars and that Bolling himself cancelled three of the remaining four orders. (A4568-72) Indeed, the cancellations were due to Bolling's failure to make any effort to order the cars from July 1967 until at least October, despite his having taken a deposit from at least one of the customers. (A4568-72, A4472-74; E1370, A4581)

No less than six of Judge Griesa's remarks quoted by plaintiffs relate to the remarkable flip-flop in Bolling's testimony and his behavior in taking deposits from customers without trying to obtain the cars they had ordered. (Pl. br. 63-64, citing A4652-55, A4661)

3. *The Mythical Jack Douglas.* In 1969, Nabcor ordered a truck from Queen City Chevrolet in Cincinnati. At the preliminary hearing, Frank Maiorana testified that Queen City refused to deliver the truck and that the manager of Queen City told him that he had spoken to someone at GM named Jack Douglas. (R881, Oct. 12, 1976, at 504-06) Maiorana claimed to have telephoned Douglas, whom he said was "the New York zone manager for Chevrolet," from Nabcor's Jenkintown office and that Douglas made a number of derogatory remarks to him. (*Id.* at 505-06)

The problem, however, was that there was no Jack Douglas in Chevrolet's New York zone, and Nabcor's telephone toll records showed no calls to Chevrolet's New York zone office. (R882, Oct. 14, 1976, at 1080-84; DX TTT; DX YYYY) The alleged call simply never happened.

4. *Disrespect for the Court.* Plaintiffs and their counsel frequently evidenced their disrespect for the Court in an apparent effort to goad the judge. On the first day of the trial, for example, Frank Maiorana stormed off the witness stand and out of the courtroom—while the jury was present—after the court sustained an objection to his counsel's questions. (*See* Tr 95-96) And during the argument of the motion for a directed verdict, plaintiffs' counsel went so far as to suggest that the judge leave the bench and that counsel would make his argument to the court stenographer. (A6180)

* * *

We could go on and on.¹⁰⁹ Suffice it to say, however, that plaintiffs' tactics were highly improper. If the judge occasionally expressed his exasperation with plaintiffs' ever-changing testimony and other aberrant behavior, he was more than justified, and his comments unquestionably arose from the proceedings before him.

D. Plaintiffs Were Repeatedly Assisted by the Judge and Had a Fair Trial

Plaintiffs' claim of bias is particularly offensive in this case. Judge Griesa went far out of his way to assist plaintiffs' inexperienced counsel in presenting plaintiffs' case. Again, a few examples will illustrate the point.

1. Plaintiffs called Frank Maiorana as their first witness at the trial, despite the fact that most of his proposed testimony had been ruled inadmissible at the preliminary hearing, leaving him with little to say and plaintiffs with virtually no admissible proof. Judge Griesa, however, was unwilling to allow plaintiffs' case to fail simply because

109. *See, e.g.*, A844-59.

their counsel had not assembled admissible evidence. He told plaintiffs' counsel in the robing room:

"I don't want your case to be defeated, although it isn't my business, although I would regret seeing it defeated because of procedural problems." (A3028)

The judge suggested that plaintiffs subpoena the automobile dealers who supposedly heard GM employees make incriminating statements; if such statements had been made, the dealers' testimony might well have been admissible. (A3033-35) Over defendants' objection, Judge Griesa interrupted defendants' cross-examination of Frank Maiorana shortly after it had begun to allow plaintiffs to call six dealer witnesses. (A3039-41; A3280-3584) As has been shown above, none of these dealer witnesses substantiated plaintiffs' claims. *Supra*, p. 15.

It is difficult to imagine action more inconsistent with prejudice against the plaintiffs or—in light of GM's strenuous objections—with bias in favor of GM. The judge instead evidenced a determination to get at the truth, whatever it might be.

2. The judge continued to search for the truth throughout the trial. One of the automobile dealer witnesses plaintiffs called in the middle of Frank Maiorana's cross-examination was Earl Stewart of Ruckle Pontiac. (A3357-3496) After plaintiffs' counsel finished his re-direct examination, Judge Griesa expressed concern that the examination had not been thorough. (A3408-20) He proceeded to question Mr. Stewart at length. (See A3420-21; Tr 881-900; A3422-74) Plaintiffs apparently believe that Judge Griesa's intervention led to favorable testimony. They cite it 34 times in their appeal brief. (See pl. br. 8-10, 13, 23-25)

3. During the course of the trial, it became clear to the court that plaintiffs had only the vaguest idea of what damages they claimed and how they would prove them. In an effort to help plaintiffs focus on this problem, Judge Griesa held a conference on a Sunday evening at which he

asked plaintiffs' counsel to itemize and explain his damage claim. (A3735-38) At the conference, plaintiffs' counsel outlined a \$45,000,000 damage claim (A3833-3917; E1444-47) which was "based on wholly arbitrary calculations." (A3907) In despair, Judge Griesa told plaintiffs' counsel:

"[Y]ou have come in after X number of days at the trial after voluminous trial preparation and I have asked you what your damage claims were and they are either all or almost entirely, totally invalid under any view I can conceive of in the proof" (A3914-15)

But instead of letting plaintiffs proceed with their untenable damage case—a course which undoubtedly would have resulted in dismissal for failure to present any evidence upon which damages could be based—Judge Griesa went to great lengths to instruct plaintiffs' counsel on how to revise and prove a damage case.¹¹⁰ (E.g., A4033-36; A4327-36; A5462-65)

* * *

The foregoing demonstrates that plaintiffs' claim of bias and prejudice is without merit. Its real motivation—already quite evident—is made still plainer by the timing below. Although plaintiffs' counsel was aware of Judge Griesa's prior membership in the Davis Polk firm months before trial, he did not raise the issue for the first time until November 23, 1977—immediately after furnishing PX 699 to the court. (A5315-35) PX 699 showed that Nabcor's boycott claim was unsupportable. *Supra*, pp. 10-11. And, with the handwriting on the wall, the disqualification motion became plaintiffs' last move in an effort to keep this case alive.

110. Plaintiffs' counsel ignored the judge's suggestions.

VIII

**Plaintiffs Were Not Erroneously Denied
Answers to Interrogatories¹¹¹**

In a single cryptic sentence, plaintiffs state that they "should have been able to obtain answers to their 'Communications Interrogatories.'" (Pl. br. 69-70) They do not claim that they moved to compel responses to those interrogatories, that the court denied any such motion, or that they were prejudiced by any failure to receive answers. The claim of error is nonsense.

The facts are these. The interrogatories in question were served in June 1976. (A2202) To the extent relevant here (pl. br. 69-70), they asked GM to state the substance of each communication, written and oral, which hundreds of named and unnamed GM employees ever had concerning any of the plaintiffs. (A2197 ¶6; A2184-97) The interrogatories were substantially identical to others served by plaintiffs in 1974. (A1150, A1154-59)

To the extent that the 1974 interrogatories—and therefore also the 1976 interrogatories—sought data relating to written communications, they were answered because GM produced all documents relating to the plaintiffs pursuant to Judge Griesa's direction. (A1383; R526, at 6-28)

GM objected to the 1974 interrogatories, insofar as they sought descriptions of oral conversations, on the ground that this would impose an undue burden and that depositions were a preferable means of eliciting such evidence. (A1383-84) The court sustained that limited objection. (A1573) Contrary to plaintiffs' unsupported claims, no one ever stopped plaintiffs from deposing anyone. Indeed,

111. This Court should not reach this issue on the grounds set forth in GM's motion to strike plaintiffs' "revised" brief, which was referred to this panel by order dated August 23, 1977.

they conducted 44 depositions over six years of pretrial proceedings. Hence, they had a full opportunity to develop whatever information they desired.

In apparent recognition of these circumstances, plaintiffs never even moved to compel answers to the so-called "Communications Interrogatories." The only reference to them was a brief and inconclusive oral colloquy in September 1976, just before the trial below. (A2226-28)

Since plaintiffs never moved below to compel responses to these interrogatories, this issue is not even before the Court. Even if the district court had denied such a motion, plaintiffs surely have not demonstrated that a refusal to compel GM to interview hundreds of employees and provide summaries of any oral conversations they may ever have had concerning plaintiffs was an abuse of discretion, which is the applicable standard.¹¹² And even if there was error with regard to these interrogatories, plaintiffs have failed to sustain their burden of showing both (1) that they could not have obtained the data by more diligent means, here depositions, and (2) that they were prejudiced by the lack of responses.¹¹³

Conclusion

The hundreds of hours of court time and thousands of hours of defendants' time invested in this case over six years have yielded the conclusion that Nabcor bought hundreds of cars without difficulty and that no reasonable person could conclude that any of the defendants had anything to do with its handful of alleged problems. That de-

112. *Baker v. F & F Investment*, 470 F.2d 778, 781 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

113. *See Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972); *Galella v. Onassis*, 487 F.2d 986, 998 (2d Cir. 1973).

cision was correct. The time has come, we most respectfully suggest, to put this case to rest.

The judgment should be affirmed.

Dated: October 24, 1977

Respectfully submitted,

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ANNEX

Plaintiffs' Claims of "Biased" Pretrial Rulings

Plaintiffs claim that a series of rulings by Judge Griesa manifest his bias against plaintiffs. (Pl. br. 65-66) Their presentation of the facts, however, is rather less than candid. We summarize the record briefly.

Plaintiffs' Claim

1. "[P]ermitted GM unlimited discovery"
2. Denied plaintiffs discovery prior to 1973 preliminary injunction hearing.
3. Denied all but 6 of 74 document production requests.
4. Vacated *sua sponte* notices of deposition.

Fact

Plaintiffs never moved to limit discovery by GM.

The discovery sought was an explanation of the "fleet program," which was irrelevant to the hearing. (A285-86) The hearing was limited by consent to whether a single dealer conspired with GM to refuse to sell to Nabcor in February 1973. (A253-54; A844-47) The denial of the discovery was without prejudice (A286), and plaintiffs later conducted it. *See also National Auto Brokers Corp. v. General Motors Corp.*, 1971 TRADE CAS. ¶73,726 (S.D.N.Y. 1971) (Gurfein, J.).

Ordered production of all documents relating to plaintiffs and documents explaining GM policy re fleet plans and warranties. Denied irrelevant discovery. (A 1024-30; R526; A1099-1139)

False. (A1204-32) Indeed, Judge Griesa granted plaintiffs' request to take the depositions of Messrs. Donner and Roche over defendants' well-founded objections. (A2229-30)

Plaintiffs' Claim

5. Vacated seven sets of interrogatories.

Fact

Plaintiffs served 552 interrogatories containing 1,489 separate questions. (R529-35) Most were irrelevant and many ridiculous. (*E.g.*, A1431; A1418; A1430) After hearing argument on objections to over 50 individual interrogatories and sustaining all of them (R602, *passim*; R592), the court vacated the interrogatories without prejudice to proper interrogatories. (A1647-48) To the extent defendants did not object, the interrogatories were answered. (*E.g.*, A1383 ¶1; A1288-1381, *passim*; A1551-60; A1618-46) *See also* Point VIII, *supra*.

6. Refused requests to refer discovery to a magistrate.
7. Would not order defendants to identify oral communications about Nabcor.
8. Required court approval for interrogatories.

True, but hardly evidence of prejudice against plaintiffs.

This issue is dealt with in Point VIII, *supra*.

After the debacle described in (5) above, the trial court did so in an effort to avoid the need for filing hundreds of pages of objections to improper interrogatories, as had occurred previously. (A1647-48) It is impossible to see how this can be viewed as anything other than a reasonable response to plaintiffs' conduct.

Plaintiffs' Claim

9. Vacated interrogatories regarding discharge of certain Chevrolet employees.
10. Denied motion to enjoin solicitation, etc.

Fact

The interrogatories, which dealt with events in 1974-75 (A 1735-37; A1742), were patently irrelevant to the issues in this case. (A1775-83)

The motion was denied after full consideration and a determination that plaintiffs' allegations were baseless. (A1858-65; A 1798-1840; A1743-93) Plaintiffs' appeal to this Court was dismissed from the bench. (A1911) *See generally* briefs in *National Auto Brokers Corp. v. General Motors Corp.*, No. 75-7196 (2d Cir. 1975).

11. Refused to permit depositions on written questions, "knowing of plaintiffs' poor financial condition."

False. Required plaintiffs to submit list of proposed deponents and report on status of discovery so the court could rule intelligently on the request. (A 1874-76) Plaintiffs never did so. *See also Business Week*, June 29, 1974, p. 86. Indeed, in order to minimize the burden of depositions, Judge Griesa permitted the use of tape recordings rather than court reporters. (A1194-97; R603 at 44-46)

12. Denied all discovery on plaintiffs' §2 claims. (A-1918)

Unsupported by cited portion of record. This claim evidently relates to one of the severed cases.

Plaintiffs' Claim

13. Quashed subpoenas.

14. Spoke to defense counsel on unrelated matters.

15. Refused to submit the case to the jury.

Fact

True, but for good reason. (First subpoena: A2207-28; second subpoena: A3275-79 [the subpoena is not in the record]; third subpoena: A4649-51 [the subpoena is not in the record]) Trial subpoenas may not be used as last-ditch discovery fishing expeditions, and there was no abuse of discretion. See, e.g., *United States v. Berrios*, 501 F.2d 1207, 1212 (2d Cir. 1974); *United States v. Watchmakers of Switzerland Inform. Ctr., Inc.*, 27 F.R.D. 513, 515-16 (S.D.N.Y. 1961); *Chase Nat. Bank v. Portland General Electric Co.*, 2 F.R.D. 484 (S.D.N.Y. 1942).

Although this was entirely proper and no notice need have been given, the judge gave advance notice to plaintiffs' counsel, who did not object.

Plaintiffs here complain only of the judge's ruling on the merits.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

FRED D. HEATHER, being sworn, says:

1. I am not a party to this action, am over the age of 18 years, and reside at 245 East 54th Street, New York, New York 10022.

2. On October 21, 1977, I served two copies of the foregoing Brief of Appellees General Motors Corporation and General Motors Acceptance Corporation upon the following attorneys at the addresses designated by them for that purpose:

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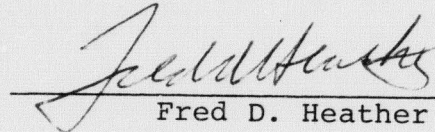
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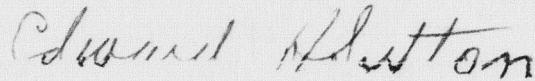
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3. Said service was made by depositing true copies thereof, enclosed in postpaid properly addressed wrappers, in an official depository under the care and custody of the United States Postal Service within the State of New York.


Fred D. Heather

Sworn to before me this
21st day of October 1977



EDWARD H. SUTTON
Notary Public, State of New York
No. 3907350
Qualified in New York County
Commission Expires March 30, 1979

966-3906

(6462)